TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 43.

EUTIMIO MONTOYA, SURVIVING PARTNER OF THE FIRM OF E. MONTOYA & SONS, APPELLANT,

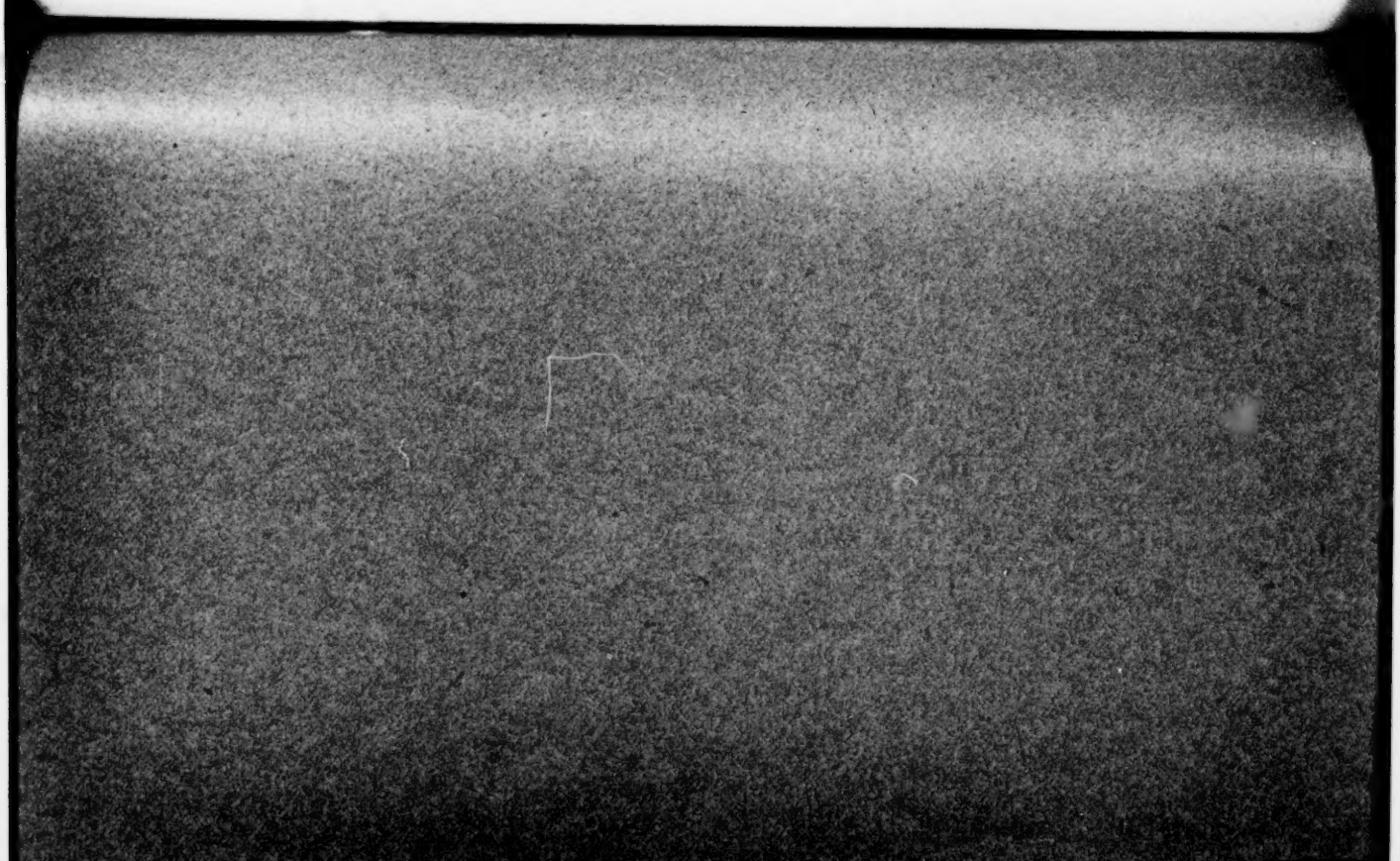
vs.

THE UNITED STATES AND THE MESCALERO APACHE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 29, 1899.

(17,387.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1900.

1 In the Court of Claims.

EUTIMIO MONTOYA, Surviving Partner of the Firm of E. Montoya & Sons, v. THE UNITED STATES and THE MESCALERO Apache Indians.	No. 1588. Indian Depredation.

I.—*Petition. Filed May* 18, 1891.

To the honorable the Court of Claims:

The claimant, Eutimio Montoya, respectfully represents:

I. That he is a resident of San Antonio, Territory of New Mexico, and that he is the sole surviving partner of the firm of E. Montoya & Sons, consisting of E. Montoya, D. S. Montoya, and Eutimio Montoya.

II. That the following property belonging to E. Montoya & Sons, citizens of the United States, was taken by Indians of a tribe or nation then in amity with the United States, the date, place, and tribe being particularly stated below:

In Socorro county, New Mexico, on or about the 12th day of March, 1880, by Mescalero Apache Indians.

2	82 mares at $50	$4,100.00
	6 saddle horses at $60	360.00
2 mules at $60		120.00
29 yearling colts at $30		870.00
1 stallion		300 00
		$5,750.00

That said Indians were chargeable for said depredation by reason of a treaty between such tribe and the United States.

III. That a claim for said property, with evidence therein, was presented to the Commissioner of Indian Affairs, the items of said claim being as aforesaid.

That the following action was taken thereon: Disallowed and reported to Congress January 12, 1882; subsequently, on November 2, 1887, disallowed and reported to Congress January 5, 1888.

IV. That no other action than as aforesaid has been had on this claim in Congress or by any of the departments; that the claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made; that the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that the claimant
3 is a citizen of the United States, and the claimant believes the facts as stated in this petition to be true.

And the claimant prays judgment upon the facts and the law in the sum of five thousand seven hundred and fifty dollars.

CHARLES & WM. B. KING,
Attorneys for Claimant.

TERRITORY OF NEW MEXICO, } ss:
County of Socorro, }

Eutimio Montoya, being duly sworn, deposes and says: I am the claimant in this case. I have read above petition, and the matters therein stated are true to the best of my knowledge and belief.

EUTIMIO MONTOYA.

Subscribed and sworn to before me this 28th day of April, 1891.

E. E. NOLD,
[SEAL.] *Notary Public.*

General Traverse.

Comes the Assistant Attorney General, on behalf of the United States and the defendant Indians, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN G. THOMPSON,
Assistant Attorney General.

SMITH.

4 II.—*Findings of Fact, Conclusions of Law, and Opinion. Filed by the Court April* 12, 1897.

I.

At the time of the depredation hereinafter found Estanislao Montoya, Desiderio Montoya, and Eutimio Montoya were partners, doing business in Socorro county, N. Mex., under the name and style of E. Montoya & Sons, and were at the time, and long prior thereto, citizens of the United States, residing at San Antonio, in said county and Territory.

Thereafter, and long prior to the passage of the act of March 3, 1891 (26 Stat. L., 851), the said Estanislao and Desiderio Montoya died leaving the claimant herein surviving.

II.

On the 12th of March, 1880, the said firm of E. Montoya & Sons were the owners of the horses, mules, and other live stock described in the petition, then being herded and cared for by their agents at a place called Nogal, about 8 miles west of San Antonio, which were stolen by Indians in the manner set forth in Finding III. Said stock was at the time and place reasonably worth more than three thousand dollars ($3,000).

III.

Prior to 1876 the Chiricahua Apache Indians were living on what was known as the Chiricahua reservation, in southeastern Arizona,

and numbered from 300 to 500 warriors. They had been a terror to the community and surroundings, and had met with success in their engagements with the troops of the United States Army. (Report Commissioner Indian Affairs, 1876, p. 10.)

In 1876 an effort was made by the authorities having charge of Indian affairs to remove said Indians and locate them on the San Carlos reservation, where they could be more certainly restrained from hostile acts, but they resisted, and the result was that only 322 Indians, of whom 42 were men under Chief Taza, were removed thither. Of those remaining 140 went to the Warm Springs agency in New Mexico, and about 400, including Victoria, became hostile and roamed about in Old and New Mexico, committing depredations and killing citizens. (Report Secretary Interior, 1875, p. 711, and *ib.*, 1876, p. 4.)

Later these Indians were aided in their acts of hostility by Apache Indians from the Warm Springs agency (Report Secretary Interior, 1877, p. 416), and from this time until December, 1878, they continued their hostile acts.

In February, 1879, Victoria, a Chiricahua, who had previously rebelled against being placed on the San Carlos reservation, came near the military post of Ojo Caliente with 22 followers and agreed to surrender on condition that Nama's band, then at Mescalero, be allowed to join him, but only a few of that band surrendered, and in April following Victoria, with his followers, escaped and went to the San Mateo mountains. (Report Secretary Interior, 1879, p. 100.)

The military forces pursued him into Arizona, where he recruited his forces from the members of his tribe then being held as prisoners of war at the San Carlos reservation, and he subsequently escaped into Old Mexico. (Record of Engagements with Hostile Indians, by General Sheridan, p. 84.)

On the 30th June following, Victoria, with 13 men, came into the Mescalero reservation, where there were at the time a few Gila, Membres, and Mogollen Apaches, known as Southern Apaches, and at his request the families of those Indians (Chiricahuas) who had been kept on the San Carlos reservation were sent for.

Victoria was soon thereafter indicted in New Mexico for murder and horse-stealing, and he became fearful of arrest and conviction therefor and suddenly left the reservation (in July), taking with him those he had brought and also all the Southern Apaches on that reservation. (Report Secretary Interior, 1879, p. 100.)

They went west and began marauding, destroying property, and killing citizens, and so continued during the latter part of winter and early spring of 1880 within 40 miles of the Mescalero reservation, Victoria in the meantime using his influence to induce the Mescaleros to join his forces, and by April, 1880, some 200 to 250, of whom 50 or 60 were men, left their reservation and joined him. (Report Secretary of Interior, 1880, p. 251.) They continued their warfare until driven by the troops under Colonel Hatch, United States Army, across the Rio Grande river into the San Andres mountains in April, 1880, where he had a

severe fight with them, and several of his men were wounded and a number of Indians, including a son of Victoria, were killed. They finally retreated into Mexico.

Under the leadership of Victoria they again crossed, and recrossed the line to and from the United States, but were driven out twice by the forces under Colonel Grierson, United States Army, and their forces diminished until finally the few remaining were driven by General Buell some time after October 1, 1880, into Mexico, where Victoria and nearly all of his followers were killed. (Report Secretary of War, 1880, pp. 86 and 118.)

During all the period of hostilites as aforesaid Victoria had under him a *minority* of the Chiricahua tribe of Apache Indians. At his solicitation he was re-enforced from time to time during said period by a *minority* of the Indians from the Mescalero and Southern Apache tribes; besides had under him a number of unknown Indians from Mexico, making in all about 200 Indians in his band at the time of the depredation hereinafter found.

These Indians were allied together under the name of Victoria's band for the purpose of aiding Victoria and his followers in their hostile and warlike acts against the citizens and the military authorities of the United States.

The alliance thus formed, as well as the hostile acts committed by the band, were without the consent of the several tribes from which the members of the band came and to which they had previously belonged.

From the reports referred to in the foregoing findings, and also in the various reports of military officers and the Secretary of War, embodied in the report of the latter officer for 1879 and 1880, it appears that the Indians under Victoria, from whatever tribes, were recognized or referred to under the name of Victoria's band, and under that name were operated against for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed as aforesaid.

On the 12th of March, 1880, the property set forth in finding II was stolen and driven away or destroyed by the Mescalero Apache Indians, who were at the time allied with Victoria's band for the purpose of hostility and war as aforesaid, and that said band so constituted was not at the time of said depredation in amity with the United States.

But the Mescalero tribe, then on their reservation near Fort Stanton, about 100 miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victoria's band, was in amity with the United States.

Said property was taken without any just cause or provocation on the part of the owners or their agents in charge, and has never been returned or paid for in whole or in part.

IV.

Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the depredation set forth in finding III was committed by Indians belonging to a war party or hostile band, known as Victoria's band, of Apache Indians, which was at and long before that time known and recognized as a band, separate and distinct in its organization and action from the several tibes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States at the date of said depredation.

V.

The claim which is the subject of this suit was presented to the defendant Indians in council on or before June 8, 1880, by S. A. Russell, agent for the Mescalero Apache Indians, under the direction of the Commissioner of Indian Affairs.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the petition be dismissed.

Opinion.

PEELLE, *J.*, delivered the opinion of the court:

The claimant, as surviving partner of the late firm of E. Montoya & Sons, seeks to recover under the act *March 3, 1891* (26 Stat. L., 851), for the loss of horses, mules, and other live stock taken
6 from them without just cause or provocation, on the 12th of March, 1880, in Socorro county, N. Mex., by Mescalero Apache Indians, then and for a long time prior thereto allied with Victoria, a Chiricahua Apache, and his followers, under the name of Victoria's band, as set forth in the findings.

Two questions are presented for our consideration: (1) What was the status of Victoria's band of Indians, *i. e.*, was it at the time of the depredation herein a band—a responsible entity—within the meaning of the act cited? And (2) if so, was it in amity with the United States?

In 1876 an effort was made to remove the Chiricahua band of Apache Indians from their homes in southeastern Arizona to the San Carlos reservation, but they resisted and a minority of them, including Victoria, became hostile and so continued until December, 1878.

In February following, Victoria, with 22 followers, came near the military post of Ojo Caliente and agreed to surrender conditionally, but in April following he, with his followers, escaped and went to the San Mateo mountains. He was pursued by the military forces, but escaped into Mexico.

In June following, Victoria, with 13 men, reported at the Mescalero reservation, near Fort Stanton, N. Mex., but, being under

indictment for murder and horse stealing, Victoria became fearful of arrest and conviction and suddenly left the reservation, taking with him those he had brought and also all the Southern Apaches on that reservation.

They went West and began marauding, destroying property and killing citizens, and so continued until the spring of 1880, Victoria in the meantime using his influence to induce the Mescaleros to join his forces; and by April, 1880, some 200 to 250, of whom 50 or 60 were men, left their reservation and joined him.

They continued their acts of hostility and warfare, engaging the United States troops in battle and in skirmishes from that time until finally driven into Mexico, where Victoria and nearly all his followers were killed.

Victoria's band was composed of a minority of the Indians from the Chiricahua, Mescalero, and other tribes of Apache Indians, and of some unknown Indians from Mexico, numbering in all, at the time of the depredation herein found, about 200 Indians, composing the band all of whom were allied together for the purpose of resisting the military authorities in placing the Chiricahuas on the San Carlos reservation, and for the purpose of aiding Victoria in his hostile and warlike acts against the citizens and the military authorities of the United States.

The claimant's contention is that the band, as thus constituted, was an unlawful mob of renegades, amenable to the civil law as murderers and robbers, and not therefore a band—a responsible entity—entitled to belligerent rights within the meaning of the act of 1891 (*supra*).

Prior to the passage of the act of 1891, the Government had entered into treaty relations with nearly all the tribes and nations of Indians in the United States and also with many of the bands composing the tribes and nations.

By such treaties the tribal relations of such Indians were thereby recognized by the political departments of the Government, but where such relations did not exist, in respect to Indians charged with committing depredations, the court will look elsewhere to ascertain their status, as the liability of the United States is limited to depredations committed by "Indians belonging to any band, tribe, or nation in amity with the United States," and are "in fact, if not in form, the primary and solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and, before any judgment should be rendered binding the United States, it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate." (*Leighton v. United States*, 161 U. S., 291, 297.)

In the *Tully case* (32 C. Cls. R., p. 1) we had occasion to consider somewhat the status of the Apache Indians in respect to their relation to the United States; and, as there stated, a treaty was negotiated with them as a nation July 1, 1852 (10 Stat. L., 979).

Later (1853) a portion of them, not including the Chiricahuas, were confederated with the Kiowa and Comanche Indians by treaty

(10 Stat. L., 1013), but in 1865 they were transferred to the Cheyennes and Arapahoes (14 Stat. L., 713).

In 1867 they were again confederated with the Kiowas and Comanches. (15 Stat. L., 589.)

But the Apaches thus confederated lived remote from the Apaches of New Mexico and Arizona and had no connection therewith at the time of the hostile acts by Victoria and his followers. So that the only treaty relation Victoria and his followers sustained to the United States was by the treaty of July 1, 1852 (*supra*) as a part of the Apache nation.

The court will therefore have to look elsewhere to ascertain the relation of Victoria's band to the United States, and in this connection the court in the *Tully case* (*supra*) said:

7 The policy of the United States in dealing with the Indians has been, as we understand, to accept the subdivisions of the Indians into such tribes or bands as the Indians themselves adopted and to treat with them accordingly.

So that if such subdivisions, whether into tribes or bands, have not been recognized by treaty, but have been by the officers of the Government whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe or band upon which to predicate a judgment.

Or if there be no such recognition by the Government, then the court will accept the subdivisions into such tribes or bands as made by the Indians themselves, whether such tribes and bands be named by reason of their geographical location or otherwise.

The confederation of Indians from the various tribes or bands under the leadership of Victoria, as set forth in the findings, was not for the purpose of robbery and theft, but was for the purpose of aiding Victoria and his Chiricahua followers in resisting the military authorities in removing them to the San Carlos reservation; and to effectuate their purpose they unitedly committed acts of hostility and war against the United States—not a single act, but continuous acts of hostility, *i. e.*, battles and skirmishes with the troops of the United States covering a period of more than two years and until their numbers were depleted in battle and the few remaining were finally driven into Mexico, where Victoria and nearly all his followers were killed.

During these acts of hostility as aforesaid Victoria and his followers were frequently recognized or referred to in the reports of the officers of the United States, both civil and military, as "Victoria's band" of Apache Indians as set forth in the findings; and as such band was operated against by the troops of the United States from "numerous camps in Mexico," as reported by Lieutenant General Sheridan, October 22, 1880. (Report Secretary of War, 1880, p. 52.)

Was the alliance of Indians thus constituted, coupled with their continuous hostile acts as aforesaid, sufficient to constitute them a band within the meaning of the act of 1891 (*supra*)?

By the first section of the act the court is given "jurisdiction and authority to inquire into and finally adjudicate" * * * "all claims for property of citizens of the United States taken or de-

stroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge and not returned or paid for."

The political status of the Indians in the United States was first considered by the court in the well-known case of *Cherokee Nation v. Georgia* (5 Pet., 1) where the court in considering the question as to whether an injunction would lie to restrain the State of Georgia from the execution of certain laws of that State, which it was alleged, among other things, would "go directly to annihilate the Cherokees as a political society and to seize, for the use of Georgia, the lands of the nation," denominated the Indian nations as "domestic dependent nations," resembling, in their relations to the United States, "a ward to his guardian," and not being a foreign nation within the meaning of section 2, article 3, of the Constitution, could not maintain a suit in the courts of the United States.

In the case of *Worcester v. The State of Georgia* (6 Pet., 515, 548) the court, in reviewing the policy of Great Britain in her relation to the Indians inhabiting this country, said: "She considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged." This, the court says, "was the settled state of things when the war of our Revolution commenced."

The first treaty, which the court says was made with the Delawares in September, 1778 (7 Stat. L., 13), was "in its language and in its provisions" formed "on the model of treaties between the crowned heads of Europe."

The court further says (p. 559):

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed, and this was a restriction which those European potentates imposed on themselves as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Later, in the case of *Holden v. Joy* (17 Wall., 211, 242), the court said:

Indian tribes are States in a certain sense, though not foreign

States, or States of the United States, within the meaning of
8 the second section of the third article of the Constitution which extends the judicial power to controversies between two or more States, between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects. They are not States within the meaning of any one of those clauses of the Constitution, and yet, in a certain domestic sense, and for certain municipal purposes, they are States, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of those treaties, and the acts of our Government, both in the executive and legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts.

The theory of those decisions was that, as the policy of Great Britain in recognizing the Indians as "nations capable of maintaining the relation of peace and war" had been recognized by the United States in their treaties with the Indians and sanctioned by the Constitution, by declaring "all treaties made or which shall be made, under the authority of the United States," as "the supreme law of the land," the status of the Indians "as distinct, independent political communities" was to continue.

It was because of those decisions that the court in the *Leighton case* (29 C. Cls. R., 288,) considered the Indian tribes as "independent political communities," entitled, in the contest of arms, to belligerent rights; and such was the holding of the court in the *Love case* (29 C. Cls. R., 332).

From an examination of the treaties found in 7 Stat. L., 13 *et seq.*, it will be seen that the first treaties made by the United States with the various Indians, beginning in 1778, were with them in their character as nations, as with the *Delaware nation, Six Nations, Choctaw nation, Creek nation, Sioux nation, Apache nation*, etc.

Subsequently other like treaties were made with the same and other Indians, recognizing them in their character as nations, while many of the nations were united or confederated together and treaties made with them accordingly.

Later treaties were made with some of these same nations as tribes, followed by many treaties with the bands composing the nation or tribe, as with the various bands composing the Sioux nation, and the bands of the Chippewas, Yakamas, Senecas, Shoshones, etc. (7 Stat. L., 257 *et seq.*, and Revision of Indian Treaties, p. 227 *et seq.*), thus showing that the United States recognized the Indians for the purpose of a treaty in whatever character they chose, whether as nations, tribes, or bands.

The main purpose in treating with the Indians was to secure and maintain peace with them, and thereby open up the country to ad-

vancing civilization; and whenever that could be attained, treaties appear to have been made with them without reference to their particular form of government or tribal organization.

The chief executive or responsible head of the organization, whatever its character, was the one whose signature was sought in making treaties.

This may furnish the reason why the Congress in the act of 1891 make no distinction between tribes, bands, and nations in respect to the amity of the political entity essential to give the court jurisdiction.

A *tribe*, says Webster's Dictionary, is—

A family, race, or series of generations, descending from the same progenitor, and kept distinct. * * *

A nation of savages or uncivilized people; a body of rude people united under one leader or government; as, the tribes of the Six Nations; the Seneca tribe of America.

A division, class, or distinct portion of people or persons, from whatever cause that distinction may have originated; as, the city of Athens was divided into ten tribes.

The Century Dictionary says *tribe* means—

Specifically, a division of a barbarous race of people, usually distinguished in some way from their congeners, united into a community under a recognized head or chief, ruling either independently or subordinately. In general the tribe, as it still exists among the American Indians and many African and Asiatic races, is the earliest form of political organizations, nations being ultimately constituted by their gradual amalgamation and loss of identity in the progress of civilization.

A *band*, as defined by Webster's Dictionary, is—

A company of persons united in any common design, especially a body of armed men.

To unite in a troop, company, or confederacy.

To confederate for some common purpose; to unite; to conspire together.

The Century Dictionary gives the same, or substantially the same, meaning. A band, therefore, may be composed of members from different tribes or families, although ordinarily a separate organization or entity within the tribe.

In speaking of the characteristics and customs of the Indians at the time the English took possession of the country, Bancroft, in his History of the United States (vol. 1, p. 80), says: "But the great peculiarity of the Indians consisted in the want of political connection. A single town often constituted a government; a collection of ten or twenty wigwams might be an independent State. The greatest chief in the country could not muster more than seven or eight hundred fighting men. The dialect of each government seemed a language by itself."

9 "Their government," he further says (vol. 2, p. 425), "rested on opinion and usage, and the motives to the usage were never embodied in language; they gained utterance only in the fact and power only from opinion. No ancient legislator believed that human

society could be maintained with so little artifice. Unconscious of political principles, they remained under the influence of instincts. Their forms of government grew out of their passions and their wants, and were therefore everywhere nearly the same. Without a code of laws, without a distinct recognition of succession in the magistracy by inheritance or election, government was conducted harmoniously by the influence of native genius, virtue, and experience. * * * The Indian chief has no crown or scepter or guards; no outward symbols of supremacy or means of giving validity to his decrees. The bounds of his authority float with the current opinion in the tribe; he is not so much obeyed as followed with the alacrity of free volition, and therefore the extent of his power depends on his personal character. There have been chiefs whose commanding genius could so overawe and sway the common mind as to gain, for a season, an almost absolute rule, while others had little authority, and, if they used menaces, were abandoned."

In the light of what has been said, was not Victoria entitled to rank as the chief or head of an organization known as a band?

It was not an assembly or organization of people having in view plunder and pillage for a day or a week and then of separating and returning to their several homes, in which case their respective tribes, if in amity with the United States, would be liable, but it was a band separate and distinct in its organization, and in its action independent of the several tribes or bands to which its members theretofore belonged; and having confederated themselves together under the leadership of Victoria as a band for the common purpose of hostilities and war, without the consent of their respective tribes, and so continued their hostile acts for more than two years, they thereby transferred their allegiance to the band and recognized Victoria as the executive head. This constituted the organization a band—a separate and distinct entity—within the meaning of the act of 1891, and as such was recognized by the officers of the United States and operated against by the military authorities in the usual mode of warfare against the Indians.

That the band as thus constituted was actually hostile to the United States from its inception until its destruction there can be no doubt; hence the band as a band was not in amity with the United States at the time of the depredation, March 12, 1880, and was not for a long time prior or subsequent thereto.

This being true, it matters not that the Mescalero tribe, to which the depredating Indians formerly belonged, was at the time in amity with the United States, as by thus allying themselves with the band under the leadership of Victoria for the purpose of war without the consent of their tribe—then at peace—they thereby transferred their allegiance to the newly organized band; and their hostile acts, therefore, are to be determined by the status of the band with which they were thus allied.

This would unquestionably be the rule if Victoria had been the chief or head man of a majority of the Chiricahuas, of which he was a member.

Where a few individual members of a tribe, at peace, without its

consent confederate with a tribe at war and engage with it in acts of hostility against the United States, and while so engaged take or destroy the property of a citizen, such individuals will, for the purpose of determining the character of such act, be considered as members of the hostile tribe.

For the reasons stated the court is without jurisdiction, and the petition is dismissed.

Howry, J., was not present when this case was tried, and took no part in the decision.

10 III.—*Judgment of the Court.*

EUTIMIO MONTOYA, Surviving Partner, *v.* THE UNITED STATES and THE MESCALERO Apache Indians.	No. 1588. Indian Depredation.

At a Court of Claims held in the city of Washington on the 12th day of April, 1897, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed.

BY THE COURT.

11 IV.—*Claimant's Application for and Allowance of Appeal.*

Now comes the claimant, Eutimio Montoya, survivor, &c., as above, by his attorneys, Charles & William B. King, and appeals from the judgment of this court entered on the 12th day of April, 1897, dismissing the petition for want of jurisdiction, and prays an allowance of such appeal.

CHARLES & WM. B. KING,
Attorneys for Claimant.

Filed July 6, 1897.

Ordered that the aforesaid application of the claimant for an appeal, filed July 6, 1897, be allowed as prayed for.

BY THE COURT.

February 20, 1899.

12 In the Court of Claims.

EUTIMIO MONTOYA, Surviving Partner of the Firm of E. Montoya & Sons, *vs.* THE UNITED STATES and THE MESCALERO Apache Indians.	No. 1588. Ind. Dep.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court

and the conclusion of law thereon, of the judgment of the court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 3d day of March, A. D. 1899.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No., 17,387. Court of Claims. Term No., 278. Eutimio Montoya, surviving partner of the firm of E. Montoya & Sons, appellant, *vs.* The United States and The Mescalero Apache Indians. Filed April 29, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

EUTIMIO MONTOYA, surviving partner, v. THE UNITED STATES *et al.*	No. 278. Appeal from the Court of Claims.

APPELLANT'S STATEMENT OF CASE, ASSIGNMENT OF ERROR, AND ARGUMENT.

STATEMENT OF CASE.

This is an appeal from the Court of Claims from a judgment adverse to the claimant (32 C. Cls. 349) in a case arising under the Indian Depredation Claims Act of March 3, 1891 (1 Supp. R. S. 913; 26 Stat. L. 851).

The question involved is the meaning of the word "band," in that provision of the first section of the statute confining the jurisdiction of the court to claims for depredations committed by Indians of a "band, tribe or nation in amity with the United States," as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any

band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

The depredation is stated in the findings to have been committed (Rec. 4) "by the Mescalero Apache Indians, who were at the time allied with Victorio's band." The facts relating to the organization and acts of Victorio's band are set forth by the Court of Claims in finding 3 (Rec. pp. 2–4). This consisted of Indians of various Apache tribes or bands, including Mescaleros and Chiricahuas, and of Indians from Mexico, having in no case a majority of any single tribe. Its number varied from time to time, being as few as 13 on June 30, 1879, and over 250 in April, 1880. Its existence dates from the effort in 1876 to put the Chiricahua Apaches on the San Carlos reservation, although the exact date of the existence of a cohesive band under Victorio does not appear. Although steadily pursued by the army for two years or more, the band was not finally broken up until the latter part of 1880 by the killing of Victorio and nearly all who were then his followers. Victorio was among the outlaws all this time except about a month, and for the greater part of the time their recognized leader. Its membership likewise varied, being composed at first of only Chiricahua Indians, afterward including some from the Warm Springs Agency, later some of the Mescaleros, and accompanied from time to time by Indians from Mexico. Its objects were lawless,—robbery and murder.

The court holds that the word "band" in the act of March 3, 1891, means, as defined by Webster, "a company of persons united in any common design" (Rec. 10); that the depredation was committed by Victorio's band, and that, in consequence, the amity of Victorio's band is the material subject of inquiry. This band being found hostile, the court holds that it is without jurisdiction.

ASSIGNMENT OF ERROR.

The claimant avers that the court erred in dismissing claimant's petition on the ground assigned, that Victorio's band was not in amity at the date of this depredation, because the Mescalero Apache tribe of Indians, by members of which this depredation was committed, was then in amity, and judgment should have been rendered for the claimant against the United States and this tribe.

ARGUMENT.

It will be seen that this case involves only a definition of the word "band." The question is, however, not of great simplicity, since light on the meaning of this word in its special relation to Indians must be found not from dictionaries, as the Court of Claims has chiefly done, but from the Indian treaties, the laws relating to Indian affairs, the act of 1891 and the interpretation of that act by the courts.

I. The Positions of the Parties.

It is first desirable to find by reference to several adjudged cases exactly what the Court of Claims holds to be the meaning of the word "band." In the present case the "band" had a more or less continuous existence for several years, for a considerable time under the same leader; it was vigorously pursued by the United States army; it committed many depredations; and its members were always regarded as outlaws or robbers deserving extermination.

In the next case on the calendar, No. 279 (Conners *v.* United States, 33 C. Cls. 317) the "band" was a portion of the Northern Cheyenne Indians, called "Dull Knife's band." This band ordinarily lived in a separate hamlet on the reservation under a leader or spokesman without

authority, but had no other separate existence. About half the tribe, including this and three other similar bands, was moved from Dakota to the Indian Territory. There Dull Knife's and Little Wolf's bands were dissatisfied and lived apart from the others. Leaving the reservation together, they separated after two weeks. Each of these bands, upon committing depredations, is treated as a separate band whose amity is material.

In another case, Herring *v.* United States (32 C. Cls. 536) the band was recruited, under a somewhat prominent chief, from different tribes, not comprising a majority of any tribe. It varied in number from 40 to 200. It continued in existence for about two years, engaging continually in robbery and murder, and was frequently in conflict with militia forces. The Court of Claims there gave this definition of a band (p. 538):

"A band, being the lowest and smallest subdivision, confederates more readily than any other form of corporate existence, so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief."

The claimant's contention is that "band," named in association with "tribe or nation," is substantially of the same meaning as those words in respect to nationality and means a separate political division of a national character, capable of making treaties or conventions, of holding tribal funds and of declaring war and so recognized by the legislative or executive department of the Government. The claimant asserts that a party of outlawed Indians, made up either from a single tribe or scattered renegades from different tribes, does not

constitute such a band. By national character, is meant that appropriate to a domestic, dependent nation (Cherokee Nation *v.* George, 5 Pet. 1; Rec. 8).

The Indians committing this depredation being of the Mescalero Apache tribe, then in amity but attached to Victorio's hostile band, the court holds that the jurisdiction is defeated by the hostility of Victorio's band, while the claimant asserts that it is maintained by the amity of the Mescalero Apache tribe.

With this understanding of the exact positions of the two parties the meaning of the word can be sought.

II. National Meaning Shown by Uses of the Words Band, Tribe and Nation in Treaties and Statutes.

Use in Treaties.

The Indian treaties contain ample instance of the uses of these words. The oldest generally used the word "nation." See the following instances, the first treaties printed in the Statutes at Large:

1778	7 Stat. L.	13, Delaware Nation.
1784	"	15, Six Nations.
1785	"	16, Wiandot and other Nations.
1786	"	21, Choctaw Nation.
1786	"	24, Chickasaw Nation.
1786	"	26, Shawanoe Nation.
1789	"	28, Wiandot and other Nations.
1789	"	33, Six Nations.
1790	"	35, Creek Nation.
1791	"	39, Cherokee Nation.
1792	"	42, Cherokee Nation.
1794	"	43, Cherokee Nation.
1794	"	44, Six Nations.
1794	"	47, Oneida and Tuscorora Nations.
1796	"	56, Creek Nation.
1797	"	61, Mohawk Nation.

1798	7 Stat. L.	62,	Cherokee Nation.
1801	"	65,	Chickasaw Nation.
1801	"	66,	Chactaw Nation.
1802	"	68,	Creek Nation.
1802	"	70,	Seneca Nation.
1802	"	72,	Seneca Nation.
1802	"	73,	Choctaw Nation.
1803	"	74,	Delawares, Eel River and other Nations.

The only treaties during the period of twenty-five years covered by the foregoing in which the Indian parties are designated as tribes are those of 1795, 7 Stat. L. 49, with the Wyandot and other tribes, which had been called nations in the treaty of 1789 above cited, and that of 1796, 7 Stat. L. 55, with the "Seven Nations or Tribes of Indians denominating themselves the Seven Nations of Canada." That of 1785 with "All the Cherokees" gives no farther designation, but in Art. VI "the nation, or the tribe" is to give up offending members. The treaty next following the last in the foregoing list is that of 1803 with the Eel River and other "nations and also the tribe of the Kickapoos." After this date the Indian parties are called nations or tribes, without any fixed rule, some being nations in one treaty and tribes in the next. Thus the Creeks are called the Creek Nation in the treaties of 1802 (7 Stat. L. 68) and 1826 (7 Stat. L. 286) but the Creek tribe in that of 1832 (7 Stat L. 366).

In the treaty of 1826 with the Belantse-etea or Minnetaree tribe (7 Stat. L. 261) article 7 provides that the Indians will not supply arms to "any nation, tribe or band of Indians not in amity with the United States." This is apparently the first use of the phrase used in the act of 1891 now under discussion.

In the treaties of 1833 and 1834 with the Appalachi-

cola band of Indians (7 Stat. L. 377, 427) the designation "band" is applied to the same Indians who were also parties to the treaty of 1823 (7 Stat. L. 224) entered into with "the Florida tribes of Indians."

The treaty of 1855 with the Blackfoot and other tribes (11 Stat. L. 657) states that it is with the Piegan, Blood, Blackfoot and Gros Ventres tribes and the Flathead nation, consisting of the Flathead, Upper Pend d'Oreille and Kootenay tribes and the Nez Perce tribe. They agree to abstain from hostilities against the following-named nations or tribes of Indians, to wit: "the Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arc, and Aunce-pa-pas bands of Sioux, and all other neighboring nations and tribes of Indians."

The treaty of 1864 (16 Stat. L. 707) was with the "Klamath and Moadoc tribes and Yahooskin band of Snake Indians." They are described in the treaty (Art. I) as "the tribes of Indians aforesaid" and (Art. IX) "the several tribes of Indians, parties to this treaty."

The treaty of 1854 (10 Stat. L. 1132) was made with the Nisqually, Puyallup and other "tribes and bands of Indians." The cession of the land is by "the tribes and bands of Indians" and in the covenants both by the United States and the Indians, they are called "the tribes and bands aforesaid."

The treaty of 1848 (9 Stat. L. 949) is with the "four confederated bands of Pawnees, viz.: Grand Pawnees, Pawnee Loups, Pawnee Republicans and Pawnee Tappage." They pledge their fidelity under the name of the Pawnee nation and agree not to make war on tribes "with whom said Pawnee tribes are at peace." The treaty is signed by the chiefs of the four bands separately under the respective names of the bands.

The treaty of 1831 (7 Stat. L. 355) is stated in its caption to be "with the tribe of Shawnee Indians residing at

Wapaghkonnetta and Hog Creek." In the preamble of the treaty and in its first, second, eighth and tenth articles the Indian party is described as "the tribe or band of Shawnee Indians." In the second article it is called "said band or tribe of Shawnees," and in the ninth article "said band of Shawnees."

Such uses of the words "nation," "tribe," and "band" might be multiplied. Those cited authorize the following conclusions:

(1) That nations, tribes and bands alike are recognized as names of proper treaty parties.

(2) That "nation" and "tribe" and "tribe" and "band" are frequently used interchangeably.

An examination of the entire series of treaties with some of the more important tribes will further establish these conclusions and will lead to others. We have selected to this end the Sioux and the Chippewa Indians, with whom many treaties have been made.

SIOUX TREATIES.

1815	7 St. L.	126	Sioux of the Lakes. The Indians are referred to as "the said tribe."
1815	"	127	Siouxs of the River St. Peter's. The Indians are referred to as "the said tribe."
1816	"	143	The parties named are "eight bands of the Siouxs, composing the three tribes called the Siouxs of the Leaf, the Siouxs of the Broad Leaf and the Siouxs who shoot in the Pine Tops."
1825	"	250	Teton, Yancton, and Yanctonies bands of the Sioux tribe of Indians. They agree that their "band or tribe" will never supply arms to "any nation or tribe of Indians not in amity with the United States."

1825	7 St. L.	252	Sioune and Ogallala tribes. The heading of this is: "Treaty with the Sioune and Ogallala tribes," but in the body of the treaty the parties are called "The Sioune and Ogallala bands of the Sioux tribe." They agree that their "bands" will never supply arms to any "nation, tribe or band of Indians not in amity with the United States."
1825	"	257	Hunkpapas band of the Sioux tribe. Similar provision to that in 7 Stat. L. 250.
1830	"	328	Medawah-Kanton, Wahpacoota, Wahpeton and Sissetong Bands or Tribes of Sioux and the Confederated Tribes of the Sacs and Foxes.
1836	"	510	Sioux of Wa-ha-shaw's tribe.
1836	"	524	This treaty is made by "the chief braves, headmen, &c. of the Otoes, Missouries, Omahaws and Yankton and Santee bands of Sioux, duly authorized by their respective tribes." The treaty throughout speaks of the parties as "the tribes."
1836	"	527	Wapaakootah, Susseton and Upper Medawakanton tribes of Sioux Indians.
1837	"	542	Yankton tribe of the Sioux Indians.
1851	10 St. L.	949	See-see-toan and Wah-pay-toan bands of Dakota or Sioux Indians.
1851	"	954	Med-ay-wa-kan-toan and Wah-pay-koo-tay bands of Sioux or Dakota Indians.
1851	11 St. L.	749	Sioux and others. See compilation of Indian Treaties (1873), pp. 1047–1050. Treaty is with "the

			following Indian nations," viz: the Sioux or Dakotahs, Cheyennes, Arrapahoes, Crows, Assenaboines, Gros Ventre Mandans and Arrickaras. The Indian parties are uniformly called "the aforesaid Indian nations."
1858	11 St. L.	743	Yancton tribe of Sioux or Dacotah Indians. They are to cease depredations on the property "of any other tribe or nation of Indians."
1858	12 St. L.	1031	Mendawakanton and Wahpakoota bands of the Dakota or Sioux tribe of Indians.
1858	"	1037	Sisseeton and Wahpaton bands of the Dakota or Sioux tribe of Indians.
1865	14 St. L.	695	Minneconjon band of Dakota or Sioux Indians. Controversies between "The Minneconjon band of Dakota or Sioux" and "other tribes of Indians" are to be peacefully settled.
1865	"	699	Lower Brule band of Dakota or Sioux Indians. Contains the same provision.
1865	"	723	Two Kettles band of Dakota or Sioux Indians. Same.
1865	"	727	Blackfeet band of Dakota or Sioux Indians. Same.
1865	"	731	Sans Arcs band of Dakota or Sioux Indians. Same.
1865	"	735	Yanktonai band of Dakota or Sioux Indians. Same.
1865	"	739	Onkpahpah band of Dakota or Sioux Indians. Same.
1865	"	743	Upper Yanktonais band of Dakota or Sioux Indians. Same.
1865	"	747	O'Gallala band of Dakota or Sioux Indians. Same.
1867	15 St. L.	505	Sissiton and Warpeton bands of Dakota or Sioux Indians.

1868	15 St. L. 635	In the introductory paragraph of the proclamation of this treaty the parties named are the "different tribes of Sioux Indians"; in the heading of the treaty they are called the "different bands of the Sioux nation of Indians." In Article VI the language is "said tribes of Indians" in one place and in another it is "of any band or tribe that is or shall hereafter become a party." Article IX speaks of "the tribes who are parties to this treaty." It is signed on behalf of the various "bands."
1874	18 St. L. 167	In the act of Congress of June 22, 1874, appropriations for support, use the following descriptions: "Sioux of Different Tribes," "different bands of the Sioux Indians," "Sisseton and Wahpeton bands of Sioux Indians" and "Yankton tribe of Sioux." Similar language is used in other appropriation acts.
1876	19 St. L. 254	The agreement of September 26, 1876, ratified by act of February 28, 1877, is made with "the different bands of Sioux Indians."

Here attention is particularly asked to the treaty of 1868, made with "the different bands of the Sioux nation," but described in the proclamation as "the different tribes of the Sioux nation." In general, the same indiscriminate use of these words appears. The Yanctons in these treaties and laws as cited are three times called the Yancton tribe and three times the Yancton band.

CHIPPEWA TREATIES.

1785	7 St. L.	16	Delaware, Chippawa and Ottawa nations of Indians. If any Indians commit a robbery, the "tribe" shall deliver them up.
1789	"	28	Wiandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac nations.
1795	"	49	Tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas and others. The Indian parties in this treaty are referred to uniformly as Indian tribes.
1805	"	87	Wyandot, Ottawa, Chipawa and other nations. The Indian parties here are throughout designated as "Indian nations."
1807	"	105	Ottoway, Chippeway, Wyandotte and Pottawatamie nations of Indians. The words "Indian nations" are used throughout.
1808	"	112	Chippewa, Ottawa and other nations of Indians.
1815	"	131	Wyandot, Delaware, Seneca, Shawanoe, Miami, Chippewa, Ottawa, Potawatimie tribes of Indians. Although designated as above in the caption the description in the introductory clause of the treaty is "the Chippewa, Ottawa and Potawatimie, tribes of Indians together with certain bands of the Wyandot, Delaware, Seneca, Shawanoe and Miami tribes." Article 3 refers to the fidelity to the United States manifested by the Wyandot, Delaware, Seneca and Shawanoe tribes, and article 4 recites an agreement between "the United States and the before-

			mentioned tribes or nations of Indians."
1816	7 St. L.	146	The united tribes of Ottawas, Chippewas and Pottowotomees.
1817	"	160	Wyandot, Chippeway and other tribes of Indians. The word "tribes" is used throughout.
1818	"	178	Deleware, Potawatamie and Chippewa tribes of Indians.
1819	"	203	The Chippewa nation of Indians.
1820	"	207	The Chippewa tribe of Indians.
1821	"	218	The Ottawa, Chippewa and Pottawatamie nations of Indians.
1825	"	272	Sioux and Chippewa and other tribes.
1827	"	303	Chippewa and other tribes.
1828	"	315	United tribes of Potawatamie, Chippewa and Ottawa Indians.
1829	"	320	The united nations of Chippewa, Ottawa and Potawatamie Indians.
1833	"	431	The united nation of Chippewa, Ottowa and Potawamie Indians. This refers to "the Chippewa tribe."
1833	"	442	The united nation of Chippewa, Ottowa and Potawatamie Indians.
1836	"	491	Ottawa and Chippewa nations of Indians. Article 1st speaks of the Indian parties as "nations" but article second calls them "tribes."
1836	"	503	The Swan Creek and Black River bands of the Chippewa nation.
1837	"	528	The Saganaw tribe of the Chippewa nation. This treaty contains a schedule of payments to chiefs "representing the several bands of the tribe of the Saganaws."
1837	"	536	The Chippewa nation.
1838	"	565	The several bands of the Chippewa nation comprehended within the district of Saganaw.

1839	7 St. L.	578	The Saganaw tribe of Chippewas.
1846	9 St. L.	853	The various bands of the Pottowautomie Indians known as the Chippewa, Ottawas and Pottowautomies and others, hereafter to be known as a nation to be called the Pottowautomie nation. The caption of the treaty describes the Indian parties as "various bands of the Pottowautomie, Chippewa and Ottawa Indians." Articles 1, 2 and 3 refer to "the said tribes of Indians." Article 4 to "the said united tribes of Indians." Article 5 to "said nation of Indians" and article 6 to "the said tribes of Indians."
1847	"	904	The Chippewa Indians of the Mississippi and Lake Superior. This treaty does not designate them either as band, tribe or nation.
184[illegible]	"	908	The Pillager band of Chippewa Indians.
1854	10 St. L.	1109	The Chippewa Indians of Lake Superior and the Mississippi. This treaty contains one article of agreement between the Chippewas of Lake Superior and the Chippewas of the Mississippi and settles a separate tract for each of a number of bands including the following: L'Anse, Vieux De Sert, La Pointe and Fond Du Lac.
1855	"	1165	The Mississippi Pillager and Lake Winnibigoshish bands of Chippewa Indians. This treaty grants separate reservations and annuities to these bands and the bands bind themselves not to commit depredations.

1855	11 St. L.	621	The Ottowa and Chippewa nations of Indians. This makes separate provision for the six bands residing at or near Sault Ste. Marie, the Beaver Island band and other bands. This treaty contains a provision that the tribal organization of the Ottowa and Chippewa Indians is dissolved and that further negotiations shall not be with a general convention of Indians but with those residing in the vicinity of any usual place of payment or immediately interested in the questions involved without the concurrence of other portions of their people. The treaty is severally signed in behalf of various bands named.
1855	"	631	Chippewa Indians of Sault Ste. Marie.
1855	"	633	The Chippewa Indians of Saginaw and that portion of the bands of Chippewa Indians of Swan Creek and Black River. This is signed separately in behalf of the Saginaw bands and the Swan Creek and Black River bands.
1859	12 St. L.	1105	The Swan Creek and Black River Chippewas. This treaty refers to the Swan Creek and Black River bands of Chippewas and unites the Munsee Indians with "the aforesaid band of Chippewas."
1863	"	1249	The Chippewas of Mississippi and the Pillager and Lake Winibigoshish bands of Chippewa Indians. This refers to various bands of Chippewas of the Mississippi and is signed severally for eight bands.

1863	13 St. L. 667	Red Lake and Pembina bands of Chippewa Indians.
1864	" 689	Red Lake and Pembina bands of Chippewa Indians.
1864	" 693	Chippewas of the Mississippi and Pillager and Lake Winnebagoshish bands of Chippewa Indians.
1864	14 St. L. 657	The Chippewas of Saginaw, Swan Creek and Black River.
1866	" 765	The Bois Forte band of Chippewa Indians.
1867	16 St. L. 719	Chippewa of the Mississippi. These Indians are referred to as the Chippewas of the Mississippi bands. A provision also occurs relative to "any person not a member of the Chippewa tribe."
1889	25 St. L. 642	The act of January 14, 1889, "for the relief and civilization of the Chippewa Indians in Minnesota" directs negotiations "with all the different bands or tribes of Chippewa Indians in the State of Minnesota.
1891	26 St. L. 992	In the Indian appropriation act of March 3, 1891, appropriations are made for the following Chippewa Indians: "Chippewas of the Mississippi," "Chippewas, Pillagers and Lake Winnebagoshish bands," "Chippewas of Red Lake," "Chippewas of Lake Superior," "Pembina tribe of Chippewas," "Otter Tail, Pillagers, Pembinas and Mississippi River Indians on the White Earth reservation," "Turtle Mountain band of Chippewas."

Uses In General Statutes.

In the general laws applicable to the management and government of Indians, the word ordinarily used is

"tribe," but both "band" and "nation" are used synonymously. In the provisions of the Revised Statutes relating to Indians, many such instances occur.

R. S. § 2079 (act of March 3, 1871) declares that "no Indian nation or tribe" shall be acknowledged as "an independent nation, tribe or power."

R. S. § 2080 (act of July 5, 1862) declares:

"Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized by proclamation to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done with good faith and legal and national obligations."

If the meaning of Congress in the enactment of this statute should be limited to tribes so described in the treaties, there is no provision for action against hostile "bands" or "nations."

R. S. § 2097 (act of July 26, 1866) provides that no funds belonging to any Indian tribe shall be applied otherwise than as stipulated in a treaty or by an express provision of the law.

In the very section R. S. § 2156 (act of June 30, 1834) which the Court of Claims has declared to be the measure of liability for Indian depredations, the words tribe and nation are used synonymously. Provision is made for compensation for depredations by "any Indian belonging to any tribe in amity with the United States"; but on complaint the Indian agent is to "make application to the nation or tribe"; and "if such nation or tribe" should neglect or refuse to make satisfaction, further steps should be taken.

The uses of these words in statutes are practically the same as we have found in treaties and lead to certain unassailable conclusions.

Definitions Drawn From Treaty and Statute.

With all these instances of the use of the words nation, tribe and band, the following conclusions may now be positively accepted:

(1) That treaties were made with Indian parties alike under the names of nation, tribe and band, each designating an organization recognized as having a separate political existence.

(2) That "tribe" was used interchangeably both with "nation" and with "band," being a generic term for the treaty party.

(3) That "tribe" sometimes designated a division of a nation and "band," sometimes a division of a tribe, and sometimes of a nation, having in either case separate treaty-making capacity.

III. National Meaning Shown by Use of Word "Band" in Act of 1891.

This now leads us directly to the use of these words in the act of March 3, 1891. We maintain that that act shows on its face an intent to use the word "band" in the sense used in these treaties, and as we have already defined it (*ante*, p. 4), an organization of like character to a nation or tribe, capable of making treaties and holding tribal funds, entitled to the recognition of belligerent rights, and so recognized by the political department of the Government. This latter we deem essential to a complete definition of the term, although not necessary to the adjudication of the present case. The words band, tribe or nation, we assert, are synonymous in requiring national character, although differing in degree and each alike refers to a "domestic, dependent nation" as defined by this court in Cherokee Nation *v.* Georgia (5 Pet. 1; Rec. 8).

We do not deny that the definition of the Court of Claims, derived from the dictionaries, "a company of persons united in any common design" is a correct definition of the word "band" in certain uses. The Indians under Victorio may properly be called Victorio's band, but the word is used in the act of 1891 in the special meaning affixed to it by long usage in connection with Indian affairs. This will appear by an examination of the act itself.

Association of Words Implies Likeness.

The words "band, tribe or nation" appear in but one place in the act of March 3, 1891. Tribe and nation always have a national meaning. "Nation" is the term of the greater dignity, indicating a body politic either among white men or Indians. "Tribe" is equally a national designation, but appropriate only to savages. "Band," although also used in the sense defined by the Court of Claims, has the same national meaning in treaties, substantially equivalent to tribe. Placed here with "tribe" and "nation," both of which possess an exclusively national meaning, it should be considered as having a like national significance. It equally designates a separate political existence, but, as "tribe" is less dignified than "nation," so "band" generally possesses less dignity than "tribe," although none the less a designation of nationality.

This is a case for the application of the maxim *noscitur a sociis*. The rule is admirably stated in Black's Interpretation of Laws, page 135:

"Associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it."

Nesbitt *v.* Lushington (4 Durn. & E. 783) was a case where corn forming a part of a cargo protected by a policy of marine insurance was seized by a mob off the coast of Ireland during the famine. In a suit on the policy, Lord Kenyon, C. J. said (p. 787):

"That which happened in the case, does not fall within the meaning of 'arrests, restraints and detainments of kings, princes, and people.' The meaning of the word 'people' may be discovered here by the accompanying words, *noscitur a sociis;* it means 'the ruling power of the country.'"

Buller, J., concurring (p. 788), said:

"Then having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes and people, of what nation, condition, or equality whatsoever.' Those words, therefore, must apply to 'nations' in their collective capacity.'

It was also decided by Lord Tenterden (Cotton *v.* James, Mood & M. 273) that a statute of bankruptcy, declaring that any fraudulent "gift, transfer or delivery" of property shall constitute an act of bankruptcy, applies only to such deliveries as are in the nature of a gift, such as change the ownership of the property, to the prejudice of creditors; it does not include a delivery to a bailee for safe keeping.

The opinion says:

"This is no act of bankruptcy. The word 'delivery' is one certainly of very general signification; but standing as it does in the statute 6 G. 4, C. 16, § 13, connected with the words 'gift or transfer,' I incline to think it must be confined in interpretation to transactions of the same nature."

The doctrine is clearly applicable here. The word "band" is to be construed in the light of the general

meaning of its associated words as possessing the characteristic common to them, separate nationality. The purpose of Congress was to say that the amity to be found in any case was to be that of the political body to which the depredator belonged. The word "band" was put in because that is one of the names by which the treaty-making parties are designated in treaties. To give to the word "band" in this connection the meaning of a gang of thieves or a village community is to put it in a classification entirely apart from the associated words.

"Tribe" Used as a Synonym for "Band, Tribe or Nation."

After its use in this place the word "nation" disappears from the act. "Band" is used but once more, and then in connection with "tribe." The claimant is directed in § 3 to set forth in his petition the "tribe or tribes or band of Indians" committing the depredation. Why was nation omitted? Because the whole meaning of nation was expressed in "tribe or band." The word tribe is used alone in the remaining places in the act, because it includes in the one word both nation and band, as a separate political organization.

Section 5 provides for the determination by the court of the value of the property taken and destroyed "and, if possible, the tribe of Indians" by whom committed and judgment shall be rendered "against the tribe of Indians." Section 6 provides that the amount of the judgment "rendered against any tribe of Indians" shall be charged against "the tribe," and provides for its payment from "annuities due said tribe" or "any appropriation for the benefit of said tribe." It further provides that the amount shall remain "a charge against such tribe" and be deducted from funds hereafter due "such

tribe." By § 10 a right of appeal is given to "the tribe of Indians."

The simplest way in which these provisions can be understood is that the same body of Indians the amity of which is to be determined is the body to be charged in the petition with the depredation, against which a judgment is to be rendered, from whose funds the amount of the judgment is to be deducted, and to whom is given a right of appeal to this court from an adverse decision below.

The word "tribe" must indeed include "band" as used in all these places. Suppose, for instance, a depredation were committed by members of the Pillager band of the Chippewa tribe, after the dissolution of the tribal organization in 1855 (11 Stat. L. 621; *ante*, p.) and after the official recognition of that band by the treaty of 1865 (12 Stat. L. 1249; *ante*, p.). They were then members of a band but not of a tribe. The amity of that band, all are agreed, would have to be found under § 1 and, under § 3, the claimant would have to set forth that band in his petition; but would it not be the court's duty under § 5 to find this band as committing the depredation and to render judgment against it, although the law uses the word "tribe"? The judgment against the band would under § 6 be charged against the funds of the band, and the band would have a right to appeal. All this would be because the word "tribe" comprehends all Indian bodies, whether called "nation," "tribe" or "band," having a separate political organization and capable of making a treaty, holding funds or being sued for the trespasses of its members. In just this way is the word "tribe" used throughout the opinion of this court in Marks *v.* United States (101 U. S. 304).

It is therefore insisted that "tribe" used later in the act includes "band," tribe or nation" and that each

word alike is used in a national sense. One word of the group can not be given a wholly separated meaning.

"Amity" Implies Nationality.

The very use of the term "in amity with the United States" implies sovereignty, although limited, or nationality, although dependent. An individidual can not be spoken of as in amity or at peace with the United States. This is said only of a nation. It can not correctly be said of a band of cut-throats or an organized gang of burglars. This court, in Marks *v.* United States (161 U. S. 304) treats these words as the opposite of "in hostility with the United States." This emphasizes the idea of national existence or sovereignty. If a band of murderers and robbers like Victorio's, whether white or Indian, is engaged in law breaking, its violations of law do not rise to a dignity which entitles it to be said "to be engaged in hostility."

Victorio's Band Had No Nationality.

But this band of Victorio's had no national existence; its organization was for robbery and murder. A nation must at least have territory and citizenship; but Victorio's band had no ground which it could call its own, and all its members belonged to some nation, tribe or band of Indians. They absented themselves awhile from the territory of their tribe and from association with its law-abiding members, but they neither forsook their membership in the tribe nor their right to a place in its territory. Victorio's band was not the kind of a band referred to in the many treaties already cited.

IV. National Meaning Shown by Prior Statutes in Pari Materia.

This view of this act is confirmed also by previous legislation on the same subject. The second paragraph

of the act of March 3, 1891, grants jurisdiction to the Court of Claims to consider also claims arising under the act of March 3, 1885 (23 Stat. L. 376). This provides for the examination of claims "chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States," and the Secretary of the Interior is then directed to report "by what tribe such depredations were committed."

This act, it will be seen, uses only the word "tribe" and the responsibilities to be considered are tribal responsibilities, but can it be questioned that the word "tribe" in this case means any treaty party, whether designated as band, tribe or nation? But it is equally clear that it does not mean a depredating band of renegades like Victorio's; they had no tribal obligations.

The Court of Claims has declared in many cases that the act of 1891 does not grant rights but gives a remedy. This is stated in Corralitos Stock Company, *v.* United States (33 C. Cls. 345):

"Every claim here pending under the remedial statute of 1891 must turn back to the statute of 1834 to establish a right of recovery. This act limits the claims to those arising from depredations committed by 'any Indian or Indians belonging to any tribe in amity with the United States' and fixes the place of loss as "within the Indian country,' or any 'State or Territory inhabited by citizens of the United States.'"

The same doctrine is expressed in McKinzie *v.* United States (34 C. Cls. 285):

"The act of 1891 (26 Stat. L. 851) did not create liabilities. The jurisdictional statute merely provided a method of adjudicating the claims for payment as they already existed as liabilities of the depredators."

The provision of the act of 1834 on which the court

holds that the rights of claimants depend (act of June 30, 1834, § 17, 4 Stat. L. 731), uses the word "tribe" alone. If the Court of Claims' decision in the present case is correct, an entirely new condition was introduced in the remedial act. Whereas, under the act of 1834 this claimant could have recovered on showing that the tribe was in amity, that court says that under the act of 1891 he must show that the marauding band to which the depredating Indians were temporarily attached was in amity, whatever the status of the tribe. It can not be doubted that the word "tribe" in the act of 1834 included nation, tribe or band, wherever national capacity existed. So equally does the expression of these three words in the act of 1891 include in each alike the idea of a national organization. Both acts make the same test of amity, that of the body politic of which the depredators were members.

V. National Meaning Shown by Treaty Provisions in Pari Materia.

In Leighton *v.* United States (161 U. S. 291) this court said (p. 296):

"Many of the treaties between the United States and Indian tribes contain not only a promise to abstain from hostilities, but also a specific stipulation that, in case of a breach of such promise, compensation shall be made out of the tribal funds, or otherwise."

See similar references to such treaties in Leighton *v.* United States (29 C. Cls. 331).

In many of these treaties the provision holding the Indians to account for depredations is in these or similar words:

"Should any one or more of them violate this pledge * * * the property taken shall be returned, or in de-

fault thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities." (Revision of Indian Treaties, pp. 381, 328, 463, 538, 563, 568, 627, 640, 653, 726, 803, 805, 980, 982, and 1045.)

In others the provision is in these or similar words:

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one * * * subject to the authority of the United States * * * the Indians herein named solemnly agree that * * * the person injured shall be reimbursed for his loss from the annuities, or the monies due or to become due to them under this or other treaties made with the United States." (Revision of Indian Treaties, pp. 137, 319, 328, 528, 915, 932, 984.)

This was the language considered in Marks *v.* United States, 161 U. S. 299.

All these treaties, whether made with the Indians designated as bands, tribes or nations, are based on the theory of a national responsibility for the acts of the members of the band, tribe or nation making this provision. The protection is against the acts of "any one or more of them" or of "bad men." It makes no difference whether a single Indian was the wrongdoer or whether a number of wrongdoers united in a tribe and forming a band for a common object commit the depredation; in either case the tribe itself became responsible. If the wilful acts of the bad men in violation of law continue to such an extent as to oblige troops to be called out against them, this creates no new nationality, nor does it relieve the existing tribe from responsibility in accordance with treaty stipulation. The decision of the Court of Claims introduces an entirely new element into the subject of tribal responsibility for depredations and gives relief to the tribe from its treaty stipulation, if the "bad men" are

numerous and maleficent enough to require armed intervention to stop their murderous proceedings.

The true reading of the act of 1891 treats the tribe responsible under these treaties as the body whose amity or hostility is material.

VI. Results of the Court's Construction.

The Court Disregards the Permanent Relation.

In the present case the court finds that the Indians who committed this depredation were members of the Mescalero Apache tribe and formed a part of Victorio's predatory band. Victorio's band was hostile; the Mescalero Apache tribe was in amity. Whose amity is to be determined? If these depredating Indians belonged to the Mescalero Apache tribe the court has jurisdiction, and that tribe is liable because in amity. If they are regarded as members of Victorio's band, that being hostile, the court has no jurisdiction. Does the court give any reason why the band's hostility should overcome the tribe's amity? The depredating Indians' allegiance to the Mescalero Apache tribe is permanent; their relations to Victorio's band were temporary. Why should the temporary membership govern rather than the permanent? The intent of the act is clearly shown by associating band, tribe and nation together, and the question for determination is the amity of that organization to which the depredators belonged, which had the characteristics common to these three designations; such as national existence, treaty-making power, or the capacity to hold funds. The Court of Claims, on the contrary, disregards the membership of these Indians in the Mescalero Apache tribe, where is their real allegiance, overlooks the amity of that tribe, and holds that the material fact is their

temporary association with a band of cut-throats engaged in lawbreaking and pursued by the army.

If "band" be used in this act in the sense asserted by the Court of Claims, the number is quite immaterial. When Victorio's band consisted of but 13, it was, if the Court of Claims be correct, as much capable of waging war and making peace as when it had over 200 members. If we so define the word, it may be supposed that a claimant may be denied compensation for a loss occasioned by five individuals declaring themselves hostile, out of such a nation as the Sioux, let us say, with its forty thousand other members quiet and at peace.

The logical result of the decision rendered in this case leads to such conclusions that its premises must be held unsound. The word "band" is used in this act in a political sense, and not in that of the lexicographer; it denotes a body having a separate political existence, which may be held to liability and may be used interchangeably with tribe and nation, in just the same meaning as in the laws of the land from the earliest days.

The Court's Construction Disregards Belligerent Rights.

Another consequence results from the doctrine of the Court of Claims in this case, demonstrating its incorrectness. If an organization of Indians possessing national characteristics and called either "nation," "tribe" or "band," is at peace, the law makes it answerable for depredations by its members. The court below holds in this case that if some of its members associate themselves with others from other tribes and enter on a career of depredation and murder and are pursued by the army, the tribal responsibility ceases. It is rather a startling consequence that tribal responsibility is lost without the act

of the tribe or the permanent severance of the member from the tribe.

The converse of this position is equally untenable. If a tribe engages in war, the act of 1891 provides, it is not responsible for the depredations of its members. Yet the Court of Claims must, to remain logical, hold that if, out of a hostile tribe, a minor band remains at peace and commits depredations, the tribe must be answerable for these depredations. How can it be that belligerent rights of the tribe are lost by the acts of a minority in opposition?

The correct rule is that the body whose amity is to be found is the body answerable for the depredation and that this is the body, whether called nation, tribe or band, which has a capacity for treaty-making and for holding funds as a separate political organization.

Possibly it may be said, in response to this view, that the marauding band whose amity the Court of Claims says is at issue is the party defendant which is to be charged with responsibility. That, indeed, seems to be the position taken by that court in Salois *v.* United States, 33 C. Cls. 335. But the temporary purpose and varying constituency of such a band, as in the present case, render it impossible to make it a party defendant. Where is Victorio's band to-day? Its existence, too, was unlawful from the beginning and it thus never acquired property from which the claimant might recover or the United States seek to indemnify itself. But the suggestion may be conclusively answered by noting that the act of 1891 uses tribe alone in designating the responsible party and that this word may appropriately include a band of national character, but can not include a marauding band of thieves like Victorio's.

The Reason for Belligerent Rights.

Special force is given to this by considering the reasons underlying the distinction in responsibility on account of amity or hostility. Why is a tribe committing depredations in a state of flagrant war not answerable for losses occasioned by it, while the tribe is answerable if the depredations are committed by its members in time of peace? This has been well stated by the Court of Claims in the elaborate opinions in Leighton *v.* United States (29 C. Cls. 288) and Love *v.* United States (29 C. Cls. 332), the former affirmed by this court (161 U. S. 291). The court say in the Leighton case (p. 325):

"The Indians being within the jurisdiction and control of the United States as 'domestic dependent nations,' it is their duty to submit to the constituted authorities; but if, instead of submitting, they resort to arms, as a band, tribe, or nation, to maintain or contest their rights, a want of amity *in fact* arises, and by reason of their recognized tribal relations by the political departments of the Government and the favorable rules of interpretation to which they are entitled, their rights as belligerents will be respected by the court in construing the remedial act of 1891."

In the Love case, they say (29 C. Cls. 348):

"Where war and not amity was the international condition of the time and the taking or destruction of property was the exercise of a belligerent right, the loss, like the losses of other citizens in other ways, must be borne by him on whom it falls, unless the Indian defendants assumed a liability for war indemnities by treaty or it was imposed as a condition to peace. Conversely, the Indian defendants can not set up their own unlawful acts of violence as a defence. To avoid liability they must show, or it must appear, that the depredation was the taking or destruction of property in the exercise of a belligerent's right to wage war."

It thus seems that the Court of Claims has recognized that the very ground of the freedom of the tribe from responsibility in war rests upon belligerent rights as recognized in international law. The tribe is not responsible for war losses because it has a right to declare war, and depredations thereafter are an incident to war. This is a doctrine based, indeed, on the very early decisions of this court (Cherokee Nation *v.* Georgia, 5 Pet. 1; Worcester *v.* Georgia, 6 Pet. 515) referred to in the opinion in this case (Rec. 8). The reason of the statutory distinction has not been as fully stated by this court, but it appears in the reasoning of the court in Marks *v.* United States (161 U. S. 302). Viewing therefore the immunity of the tribe from liability in war as based upon its belligerent rights, it necessarily follows that the right can only arise on behalf of some organization of capacity to declare war and peace. It is wholly inconsistent with this reason to hold that belligerent rights may arise on the part of a body or band of Indians which had none of the attributes recognized in Worcester *v.* Georgia (6 Pet. 548) quoted by the Court of Claims in this case (Rec. 8) where in reviewing the policy of Great Britain in relation to the Indians adopted by this country, this court said:

"She considered them as nations capable of maintaining the relations of peace and war; of governing themselves under her protection; and she made treaties with them, the obligation of which she acknowledged."

The language quoted further in the same passage and that from Holden *v.* Joy (17 Wall. 211) also quoted, marks this distinction.

No Belligerent Rights in this Case.

A band of outlaws made up from turbulent elements of various tribes has no right to declare war or make peace.

In this case the Chiricahua and Mescalero Apaches as Indian tribes were at peace. Their majorities remained on their reservations. The case was that described by the Court of Claims in the opinion already cited in Leighton *v.* United States, 29 C. Cls. 326:

"In other words, the amity of the band, tribe, or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on the citizens and commit depredations."

A few turbulent spirits left the reservations, joined others of like character from other reservations, broke the laws of the United States, robbed and murdered citizens and defied the soldiers, acting as military police, sent after them. It can not be said that with this organization for purposes of plunder arose a new Indian nation with whom treaties were to be made and who were to be recognized as lawfully robbing and murdering in the exercise of belligerent rights. Could they gain a new political existence because the United States uses its army as a police force against Indians? There is certainly no fact shown in the history of these Indians either in the findings of the Court of Claims or elsewhere to indicate that the political branch of the Government regarded them as other than law-breakers to be subdued. They never had the necessary cohesion which would make them the proper subject of negotiations as a new tribe. They separated and gathered together as their convenience dictated. If some of his warriors left Victorio, they returned to their reservations and resumed their relations with the Mescalero or Chiricahua or other tribe to which they belonged.

Thus we see that the very reason for granting belligerent rights is wanting in the case of a disorganized and robber

band without national character. The responsibility of the tribe to which these Indians belonged, for their depredations, is not changed. The tribe itself has not declared war. Its responsibilities are not reduced by the union of its renegades for whose depredations it is responsible with other renegades from other tribes, requiring together pursuit by the army.

The law makes the band, tribe or nation to which the depredator belongs responsible for his acts so long as it is in amity. That responsibility ceases only when the band, tribe or nation itself engages in hostility. The very occasion for the exercise of the responsibility is the wrongdoing of the individual.

VII. Recognition by the Political Departments.

In our definition of "band" (*ante* p. 4) we stated that the band contemplated in the act must be one which had been recognized by the political department of the Government. That is not a part of the definition essential to the decision of the present case, since Victorio's band had none of the characteristics of a band, tribe or nation such as the act of 1891 contemplates. It is none the less a material element in a correct definition. This court has in numerous cases held that the recognition of political rights devolves upon the political department of the Government. In Holden *v.* Joy (17 Wall. 211) this court said (p. 242):

"Laws have been enacted by Congress in the spirit of those treaties, and the acts of our Government, both in the executive and the legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts."

In Fellows *v.* Blacksmith (19 How. 366) the court thus

declares (p. 372) the bonds between the political and judicial departments in the ratification of an Indian treaty:

"An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and headmen of the band in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an act of Congress."

In the case of United States *v.* Holliday (3 Wall. 407) this court said on this point (p. 419):

"The facts in this case certified up with the division of opinion, show distinctly 'that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved.' In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress."

The same doctrine was declared in the case of the Kansas Indians (5 Wall. 737).

It is not claimed that the only bands, tribes or nations whose amity is to be found under the act of March 3, 1891, are those with which treaties have been made. The

Court of Claims in Graham *v.* United States (30 C. Cls. 333), declares very soundly as follows:

"By this treaty 'with the representatives of the Sioux Nation,' *i. e.*, the chiefs and headmen of the 'different bands of the Sioux Nation of Indians,' they are recognized in their dual capacity as a nation and as separate bands composing the nation. And when that national or tribal relation has been established by the political departments the courts are bound by it. (United States *v.* Holliday, 3 Wall. 407.) Not that Indians under treaty relations only are suable under the act of 1891, but that by such treaties the relations of the Indians in their organized or tribal capacity is thereby fixed and recognized." (Kansas Indians, 5 Wall. 737).

It is insisted, however, that there must be some political recognition of the national character of the Indians. If by treaty, that must govern. If by appropriations for their support, where divisions are recognized which do not appear in treaty, these are within the terms of the act of 1891. Whenever a division appears as duly recognized by the political department of the Government whereby the treaty-making power is conceded or the right to hold separate tribal funds, then the courts may treat these Indian parties as bands, tribes or nations within the meaning of the act of 1891. They are to be charged in the petition, their amity is to be alleged and proved, their responsibility for the depredation is to be fixed by the judgment of the court and their funds are to answer.

CONCLUSION.

The framers of this act, finding the Indian tribes described in treaties sometimes as nations, sometimes as tribes, sometimes as bands, desired to avoid any uncer-

tainty as to the amity to be found by using all three synonymous words in the opening of the act; after that, the less used words were dropped and the single comprehensive word "tribe" stood throughout the act for them all. Each word means alike an organization having a distinct national existence. Nationality can not be newly acquired by union for breaking the law or laid down when too close pursuit renders law-breaking impracticable.

WILLIAM B. KING,
W. H. ROBESON,
Attorneys for Appellant.

No. 43.

Reply Brief of King v Robertson

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Supreme Court of the United States.

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EUTIMIO MONTOYA, surviving partner,
v.
THE UNITED STATES *et al.* } No. 43.

BRIEF FOR APPELLANT IN REPLY.

The learned and enlightening brief of the Assistant Attorney-General is of great aid in bringing to a clear issue the exact points in controversy. His positions are substantially as follows:

I. He maintains (pp. 30–36) that the appellant has made erroneous conclusions of fact from the findings, as to the character of Victorio's band.

II. He has accepted the definition by the appellant that the word "band" is similar in meaning to "tribe" and "nation" in requiring national character.

III. He insists that the facts found show Victorio's band to possess this national character.

The Court of Claims defined "band" (appellant's brief, pp. 3, 4) as different in kind from "tribe" or "nation." The appellant's opening brief was devoted to combatting that definition. The brief of appellees, substantially accepting the definition of the appellant's, and stating the defence to be largely a question of fact (appellees' brief, p. 35), has changed the issue from one of definition and renders a further brief essential. The points above will therefore be discussed in order: (1) the character in fact of Victorio's band as disclosed in the findings; (2) the exact criterion fixed by the defendants for a "band" as

used in the statute and (3) whether the facts warrant the inclusion of Victorio's band within a proper definition of the statutory term.

I. The Facts.

The appellant asserts that the findings of the Court of Claims show:

(a) That membership in Victorio's band was not permanent, but was made up of persons retaining membership in their tribes.

(b) That the band's only separate existence was for the purposes of disorder stated in the findings.

(c) That it had no geographical location.

Composition of the Band.

The statements of Finding III (Rec. 2) as to the number in the band and their tribal membership may be reduced to tabular form as follows. The table begins in April, 1879, as hostilities ceased in December, 1878, and the Indians were quiet until the next April.

DATE.	NUMBER.	TRIBE.
1879		
April	22 in all	Chiracahua
May and June	Additions, not numbered	"
June 30	13 in all	"
July	13 and "a few" others	Chiracahua and Southern Apaches of Gila, Membres and Mongollon tribes.
1880		
March	About 200	Chiracahuas, Southern Apaches, Mescaleros and Mexican Indians.
April	200–250	Additional Mescaleros.
During Summer	Diminishing numbers	
October	Band scattered and the remnant annihilated	

These figures are carefully taken from the statements of Finding III on pp. 3 and 4 of the record. They show very plainly the fluctuating number and the varying constituency of the band. They amply justify the appellant's statement's (brief, pp. 23, 27) that the relation of the members to it was temporary, while that to their tribes was permanent. The appellee's brief combats this view vigorously (pp. 31–33) and seeks to sustain its contention by supplying from the opinion facts not stated in the findings. But this course is distinctly inhibited by this court in Stone *v.* United States, 164 U. S. 383.

The Court of Claims recognizes the Indians who committed this depredation as Mescalero Apaches, and finds that before they joined Victorio's band they were members of the Mescalero tribe. But when Victorio's band was scattered, where else could those Mescaleros go except back to their own people? It nowhere appears that they severed their relations to their tribe by associating with Victorio.

The Band's Existence Temporary.

The band itself had no separate existence previous to the organization for violence described in the findings. There were hostilities by Chiricahuas, "including Victorio," in 1876, continuing to December, 1878 (Finding III, Rec. 3). Victorio first appears as a leader, in February, 1879, of twenty-two followers. It was not until July that he had any considerable following from various tribes.

The only separate existence which the band had was for the acts described in the finding in these words: "marauding, destroying property and killing citizens," and for acts embraced in the phrase: "They continued their warfare." The purposes of the band are summarized as follows (Rec. 4):

"These Indians were allied together under the name of Victorio's band for the purpose of aiding Victorio and his followers in their hostile and warlike acts against the citizens and the military authorities of the United States."

That is to say, they combined attacks against private persons and property with resistance to forces sent to subdue them. No *quasi* public purpose is shown. The organized resistance of the Chiricahua Indians to avoid removal had ceased in December, 1878, but this band of mixed Indians was organized after that without other purpose than disorder. They preferred fighting to the monotony of peace.

"The few remaining" of the band who continued away from their respective reservations were finally killed by the military. The United States employed its army against them as the Dominion of Canada employs its Mounted Police for similar purposes. The use of the army was to put down the disorder of these Indians, involving no recognition of belligerent rights or of national character.

The existence of the band itself as an organization possessing any attributes of political independence whatever began in purposes of disorder, whether called "marauding" or "warfare," and ended when that disorder was made impossible by pursuit.

The Band Had No Location.

The want of any fixed locality is shown by the findings. This band roamed over territory occupied either by white men or by the tribes of which its membership was composed, without any defined situs of its own.

The legal consequences of these facts will be discussed later.

II. The Definition of a Band.

The appellant's brief gives the following definition of a band (p. 4):

"The claimant's contention is that 'band,' named in association with 'tribe or nation,' is substantially of the same meaning as those words in respect to nationality and means a separate political division of a national character, capable of making treaties or conventions, of holding tribal funds and of declaring war and so recognized by the legislative or executive department of the Government. The claimant asserts that a party of outlawed Indians, made up either from a single tribe or scattered renegades from different tribes, does not constitute such a band. By national character is meant that appropriate to a domestic dependent nation (Cherokee Nation *v.* Georgia, 5 Pet. 1, Rec. 8)."

The definition by the Court of Claims is given on the same page.

The Concessions by the Appellees.

The Assistant Attorney-General admits that the meaning of the words "band, tribe or nation," in this statute is not that of ordinary literature, to be found in dictionaries. He says (brief, pp. 6, 7):

"The meaning of these terms must be derived from usage. Fortunately, we have the long-continued use of all of them in treaties, official documents, opinions of the courts, and historical writings."

His elaborate study of the authorities cited in his brief (pp. 3–15), confirmed by those cited in appellant's brief (pp. 5–27), has led him to recognize very frankly the position of the appellant, that the "band" named in the statute is identical with "tribe or nation" in the requirement of national character. He is forced from the extreme position of the Court of Claims to a definition in all essentials that of the appellant. He says (brief, p. 9):

"If we pursue further the distinctions which we have assumed to exist between nation and tribe and tribe and band, we find that the band is an aggregation of Indians in many cases differing in no respect from a tribe, as in the case of the Ogallala band or tribe of Sioux. In other cases it is smaller and less prominent, or less ancient in its origin than most tribes, although still differing in no respects from other tribes."

He says again (p. 22):

"In the last analysis the distinctions between band and tribe and tribe and nation vanish."

On p. 23 he admits that it may be granted as an abstract proposition that the words "band, tribe or nation" in the act of 1891, mean no more than the word "tribe" in the act of 1834.

"The appellees accept the conclusion that the word 'band' has a similar meaning to the words 'tribe' and 'nation'; but to be similar is not to be identical" (p. 25).

"The use of the word 'band' indicates a knowledge on the part of Congress of the possible or actual existence of an independent political organization among Indians which was not fully described by the word 'tribe,' though in all essential respects resembling a tribe" (pp. 25, 26).

In selecting these passages, we would invite attention in each case to the context to avoid any chance of misinterpretation of detached passages.

On p. 34, he accepts our definition of "band" in its application to this case and maintains that the facts bring Victoria's band within it.

The Appellees' Tests of a "Band."

What then is the test which the appellees insist upon as the essential of a "band"? It must be one common alike to band, tribe or nation, since he has conceded

that "in the last analysis the distinctions vanish" and that the "political organization" described as a band is is one "in all essential respects resembling a tribe." There are two found in the brief.

The first is the band's independence. This is suggested on p. 6, as "independence of other Indian authority." The brief says (p. 23) that in ascertaining the amity of a tribe the court

"Would look to the actual independent political body, under whatever name, and its status with reference to amity would determine the jurisdiction of the court."

This test is finally stated with precision on p. 27:

"In the opinion of counsel for the appellees the test to be applied is that of independence. By this is meant not absolute independence, which no Indian State has, or ever had after the advent of the Caucasian race, but independence of other Indian authority."

This is the best defined position of the appellees. There is yet another, more or less openly asserted, approaching nearer to the position of the Court of Claims. It is that the fact of hostility creates nationality. This idea is not willingly asserted, because it is inconsistent with the definition of a band as involving nationality, which the learned Assistant Attorney-General has already clearly admitted. The position is evidently taken because it is the only one which will include Victorio's band. It first appears on page 4, where it is said:

"A band of Indians might be confederated together even for an unlawful purpose—so long as it did not involve hostility to the United States—without bringing themselves within the meaning of the statute."

This parenthetical clause is clearly intended to claim that active hostility *ipso facto* gives national character to the hostile party. This is stated on page 23, where it is

said that the statute provides indemnity for depredations committed:

"Whenever any organized and armed Indian opposition to the United States' authority and forces is in the field, persisting for a period of years under the same organization and the same leaders in the policy of war against the United States."

Thus we have the appellees' positions shown:

(a) "Band" implies nationality.

(b) The test of nationality is independence of other Indian authority.

(c) Hostility creates nationality.

III. The Legal Consequences.

These positions of the appellees being made plain, they can be discussed in their relation to the facts found by the court. We have seen that the band led by Victorio had no territory, no exclusive membership, and existed only for purposes of violence.

No Nation Without Territory.

It can not be maintained that savage tribes must have absolutely accurate boundaries. But it is a fact of history that the Indian tribes have always had general territorial boundaries within which they lived and hunted. Thus in the earliest history of the country the boundaries of the Six Nations, of the Choctaws, Chickasaws, Creeks and Cherokees and other greater or less tribes were recognized (see treaties cited, appellant's brief, pp. 5, 6). The object of many of the early treaties was to reduce to writing previously known but inaccurately defined boundaries. It was equally so in later years with the western tribes. Boundary disputes frequently arose among the Indians. One of the most celebrated Indian treaties, that of Fort Laramie of 1851 (Revised Indian Treaties, 1047), was de-

voted to defining the respective territories of the Sioux, Crow, Cheyenne and Arapahoe and other great nations of Indians.

The very Apache Indians named in the findings furnish a striking instance of tribal possession of fixed territory. One tribe takes its name from the Gila River, one from the Mimbres River and one from the Mogollon Mountains. Others of the names cited on page 16 of appellees' brief will at once be recognized as geographical.

There is then a great discrimination to be drawn between the national character of a tribe or band occupying territory on the Gila River or in the Mogollon Mountains and one like Victorio's band, claiming and having no territory. As a body it had no place; its several members had a right on the reservations or other territory of their respective tribes. What aspect of nationality has an organization without territory, made up of members who have each a place in his own tribe? Yet even the Court of Claims seeks to find a semblance of nationality in the "company of persons united in any common design" in order to bring the "band" within this statute, and the learned counsel for appellees finds that his researches oblige him to define a "band" as in all essentials equivalent to "tribe or nation."

No Separate Membership.

Even of greater importance is the manner of composition of this band. It was picked up out of several existing bands and tribes. Its membership was composed of those who came from the Chiricahua, Mescalero, Gila, Mimbres, Mogollon and other tribes. They returned to these when their period of law breaking and resistance to authority ceased. There was no abandonment of tribal relationship in joining Victorio's band.

Existence Solely for Disorder.

We have seen that the existence of Victorio's band began and continued for disorder only, without other purpose.

There is nothing to indicate that the new nation supposed to have been created under Victorio's leadership from many scattered tribes would have remained a single body had the vigor of its hostilities convinced the authorities of the United States that its desires, if any definite desires were made known, should be granted.

It seems unnecessary to argue that disorderly resistance to authority can not create a nation. Something more is essential,—the possession of territory, the adherence of citizens for the formation of a permanent state, the successful organization of something beside a fighting force. What corresponds to these in the weaker bonds of savage society must exist to constitute a savage "band, tribe or nation" in the admitted meaning of the statute.

National character is surely wanting even in an Indian band or tribe where the organization, unlike all other similar Indian organizations, has no territory of its own, has no membership independent of membership in other tribes and has no elements of national permanence. Having abandoned the literary definition of the word "band," it is not possible to accept hostility alone, even long continued, as creating the national character accepted by the Assistant Attorney-General, as equally essential to "band, tribe or nation."

The essential error in the argument of the Assistant Attorney-General on this point (brief, pp. 22, 23) is that he reads the statute as if it made the existence of any hostilities fatal to the jurisdiction. It is tribal hostility by the depredator's "band, tribe or nation" which takes away jurisdiction. The claim must be admitted to juris-

diction unless the depredator's band, tribe or nation, in the national sense conceded to these words, is hostile.

A nation is entitled to belligerent rights because it is a nation, not because it carries on a war. A discussion of the recognition of belligerent rights is in our original brief (pp. 28–33).

Victorio's Band Not Independent.

The test of independence of other Indian authority proposed by appellees can not be applied to this band. What independence has a band or nation which has no recognized territory of its own, and is an intruder wherever it locates? What independence has a band whose members are all members of other bands or tribes and who are subject to such laws and customs of their own tribes as savage life imposes?

IV. The Depredators were Mescaleros, a Tribe in Amity.

There is another view of this case which is suggested and somewhat discussed in the opening brief for appellant (p. 27), but needs restatement and amplification. The Court of Claims has made this finding (Rec. 4):

"On the twelfth of March, 1880, the property set forth in Finding II was stolen and driven away or destroyed by the Mescalero Apache Indians, who were at the time allied with Victorio's band for the purpose of hostility and war as aforesaid, and that said band so constituted was not at the time of said depredation in amity with the United States.

"But the Mescalero tribe, then on their reservation near Fort Stanton, about 100 miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victorio's band, was in amity with the United States."

The statute on which the jurisdiction of the court rests in this case (appellant's brief, p. 1) requires the adjudication of claims for property "taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States." The Court of Claims finds that the Indians who took this property were Mescalero Apaches and that the tribe to which they belonged was in amity. Nothing more is needed to complete the jurisdiction of the court. It is not found that the alliance of these Indians with Victorio's band deprived them of their membership in the Mescalero Apache tribe. If they were members both of the Mescalero Apache tribe and of Victorio's band, even conceding this to be a band within the meaning of the statute, no reason can be assigned why the hostility of that band should control the responsibility of the tribe.

The Assistant Attorney-General admits (p. 39) that the "Mescaleros were bound to restrain their own members." He seems to think that he has answered the charge that this responsibility extended to preventing their members from joining a hostile band like Victorio's by saying that the Mescaleros "were not obliged to go to war with Victorio's band to reclaim former members of their tribe who had joined that band."

The theory of the act of 1891 and its predecessors is that the Indian tribe must answer for the wrong doings of its members while the tribe is in amity. It was equally its duty to prevent its members from joining other evil-disposed Indians as to prevent them from depredations on their own account. The tribe should be held answerable in this case because it had permitted its members to ally themselves with the turbulent element of another tribe and in so doing they had committed depredations upon the property of citizens.

V. The General Purpose of the Act.

The purpose of Congress has been to draw the line of tribal responsibility between losses in amity and losses in hostility, but the test of tribal responsibility is tribal amity and tribal hostility. The national meaning of the word "band" is no longer disputed, an organization "in all essential respects resembling a tribe" (appellees' brief, p. 26). The body whose amity is to be determined where unruly members of different tribes conspire together, is the body possessing permanent national characteristics and not the temporary and unlawful organization.

It is unfortunate that the Court of Claims did not adhere to the rule announced in the case of Leighton *v.* United States, 29 C. Cls. 326:

"Where a small party of Indians or a minority of a tribe, without the consent of such tribe, engage in such a raid, though they encounter United States troops and engage them in battle, the condition of amity between such tribe and the United States will not thereby be changed.

In other words, the amity of the band, tribe, or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on the citizens and commit depredations."

In asking this Court to reverse the judgment of the Court of Claims in the pending case we are asking the affirmance of the doctrine laid down in the case just cited. The earlier view of the court below is sounder than the later.

William B. King,
W. H. Robeson,
Attorneys for Appellant.

No. 278 D.X.R. 43

Brf. of Atty. Gen. (Thompson) for Appellees

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Montoya brought suit in the Court of Claims under the provisions of the Indian depredation act of March 3, 1891, alleging that certain Indians belonging to the Mescalero Apache tribe had, on or about the 12th day of March, 1880, taken from him property amounting in value to $5,750.

The act of March 3, 1891, provides for recovery for—

> All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States.

The Court of Claims held that the property of the claimant was taken by Indians who belonged to Victoria's band of Apaches; that that band was not at the time of the depredation, and had not been for two years prior to that time, in amity with the United States; and thereupon dismissed the petition. The claimant appeals from that judgment.

The contention of the appellant is that the court erred in finding that the band to which the Indians committing the depredation belonged was a band within the meaning of the act of March 3, 1891; that Victoria's band had not the capacity for hostility to the United States; that it was not an independent band; that the responsible entity against whom judgment should be rendered is the tribe or nation to which the band belonged, or to which the Indians who committed the depredation originally belonged; and that the band itself did not sustain a relation of hostility to the United States at the time of the alleged depredation.

The last contention, so far as it relates to the fact of hostility, as distinguished from the question of responsibility, is a question of fact which it would be appropriate to urge on motion for a new trial, but which is not raised by the record here. The ultimate finding of fact made by the Court of Claims, that Victoria's band was not in amity with the United States, supported as it is by the findings showing military activity on the part of the Indians and the United States, establishes the fact of hostility; and this court will not go back to those findings for the purpose of inquiring into the actual status of the Indians in that respect. The general question of the

meaning and application of the word "amity" in the act of March 3, 1891, in previous acts, is settled by the case of *Marks* v. *The United States et al.* (161 U. S., 297).

The other contentions made by the appellant are all resolvable into the one proposition that Victoria's band was not such a "band" as was contemplated by the act of March 3, 1891; and that is the sole question raised in this case.

WHAT IS A BAND OF INDIANS?

The statement of the case in the appellant's brief (p. 2) assumes that the decision of the Court of Claims rests solely upon the dictionary definition of the word band—"a company of persons united in any common design"—and does not hold that such band must be and in this case was a recognized political division among Indians. Even a cursory reading of the opinion of the Court of Claims will show that this assumption is incorrect. While the court did, of course, regard the ordinary meaning of the word as fixed by universal usage, it also considered the characteristics and customs of Indians, the recognition of their tribes as separate political entities, and concluded that Victoria's band was "long before that time known and recognized as a band separate and distinct in its organization and action." (Record, p. 5.)

The word "band" is not one which has a technical meaning. Subject to the requirements of the context, it is undoubtedly used in its ordinary signification, and must be so read. According to Webster a band is—

> A company of persons united in any common design, especially a body of armed men.

In the Century Dictionary a band is defined as—

> A company of persons, especially a body of armed men; a company of soldiers or persons united for any purpose.

The definition of the same word when used as a verb is, according to Webster—

> To unite in a troop, company, or confederacy; to confederate for some common purpose; to unite; to conspire together.

And according to the Century dictionary—

> To unite in a troop, company, or confederacy; to unite; associate; confederate for some common purpose.

It is indisputable that Victoria's band of Indians was a "band" in the ordinary sense of the term as fixed by common and universal usage. These Indians—not the particular ones who may have committed a depredation, but the recognized political body to which they belonged—were "a company of persons united in a common design;" they were "a body of armed men;" they were "united in a troop, company, or confederacy;" they had "confederated for a common purpose" and "conspired together."

Were they, then, such a "band" as was intended by the act of March 3, 1891? It is admitted, of course, that there might be a band of Indians confederated together for a purpose which would be wholly lawful, and that a band of Indians might be confederated together even for an unlawful purpose—so long as it did not involve hostility to the United States—without bringing themselves within the meaning of the statute.

The band of this statute must be a band capable of being in hostility against the United States. It is by inference something inferior to a tribe, as a tribe is inferior to a nation of Indians. The words are "any band, tribe, or nation." It must be in a measure independent, or it could not sustain a relation of hostility. On the other hand, it need not possess all the attributes of sovereignty, for no Indian tribe or nation has these, yet it is not disputed that such tribes and nations may be hostile within the meaning of the statute. It need not possess the capacity of making peace and war in the strictest sense of international law; for, as this court has said in the case of *Marks* v. *the United States et al.*) 161 U. S., 297):

> Without questioning these declarations and decisions, as applied to the relations between independent nations, we think they avail but little in the solution of the question here presented. That question is, What limitation did Congress intend by the words "in amity with the United States?" The word "amity" is not a technical term. It is a word of common use, and such words when found in the statute must be given their ordinary meaning unless there be something in the context which compels a narrower or different scope.

And further:

> We * * * are of the opinion that all that Congress meant was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of citizens of the United States, such depredation

> might be investigated and the amount of the loss determined and adjudicated by the Court of Claims.
>
> And if, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the petition [that the tribe was in amity] is not sustained.

Given independence (by which is meant independence of other Indian authority) and a purpose to resist the authority of the United States by force of arms, on the part of the Indian band; and on the part of the United States the long-continued prosecution of hostilities against this band by formidable bodies of troops, and the accordance to them of the rights and privileges of belligerents when captured or when negotiating for terms, and, resulting from the attitude of the opposing forces, many skirmishes and some pitched battles, in which many Indians and many soldiers lost their lives, ending with either the surrender of the forces of the Indians under the regular forms and customs of war (which was the outcome in the case of one hostile band much smaller and less formidable than Victoria's band) or the extermination of the hostiles or the dispersion of the remnant of the band into smaller bands of guerillas, have we not here all the elements that are necessary to make a state of Indian warfare?

DISTINCTION BETWEEN TRIBE AND NATION.

Three different grades or classes of organization among Indians seem to be recognized by the statute—the band, the tribe, and the nation. The meaning of these terms must be derived from usage. Fortunately, we have the

long-continued use of all of them in treaties, official documents, opinions of the courts, and historical writings.

A "nation" of Indians may comprise several tribes, and is sometimes a loose term employed to denote a group of allied tribes, or a group of tribes having racial affinity with one another, where such tribes are severally independent and where no national organization exists; as in the case of the Apache Nation, the Sioux Nation. There is not and never was any central authority or organization whatever among the various tribes or bands of Sioux; so far as history records there never was any attempt at such organization on the part of the Apaches, the various tribes and bands being absolutely independent and autonomous in all respects. On the other hand, the term "nation" is also used to designate those political organizations of Indians which are farthest advanced in civilization and have the idea of civil government most fully developed; among these are the Creek Nation, the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation; these, with the Seminoles, are also frequently described as "the five civilized tribes," the terms tribe and nation being used here, as elsewhere, interchangeably by authoritative writers on the subject of Indian history. (Vide Census, 1890, volume relating to Indians, p. 25.)

There can be no hard and fast line drawn between a "nation" of Indians and a "tribe." The two words, when not used synonomously, convey so nearly the same meaning, and are so often used interchangeably as applied to the same divisions of Indians, that it is difficult to

distinguish between them in any degree. Where a distinction is intended it may be said that the tribe is usually smaller in numbers, though not always; the Comanche tribe or the Navajo tribe could muster thousands of warriors, while some of the so-called nations are much smaller. As compared with some of the bodies of Indians which are usually accorded the title of "nation," the tribe possesses a lower degree of civilization; its organization is not so complete, or is of a more primitive order, and it is more likely to be nomadic in character and to have no permanent home or seat of government.

The number of tribes of Indians in the United States is, and has been, very great in proportion to the total Indian population. The Indian population has ranged, according to various estimates and censuses, from 248,000 (the present enumeration) to 471,000, an estimate made by Jedidiah Morse in 1822. Competent modern opinion holds that, contrary to the view once commonly accepted, the aborigines have increased in numbers rather than diminished; and that the total number within the present limits of the United States has never been greater than it is to-day. The number of distinct tribes and bands which have been recognized by treaty is very great. Prior to the year 1871, when Congress abolished the practice of making treaties with Indian tribes, 666 treaties had been negotiated (*Marks et al.* v. *The United States*, 161 U. S., 297). Many of these were with the same bands or tribes; but, on the other hand, there were many with whom no treaties were ever made; witness the various tribes of Apaches, the Mission Indians and other tribes in California, the different pueblos of New

Mexico. Many of the tribes once treated with have become extinct or merged with the white population, some new tribes and bands have arisen, and many have become known which were not known to the earlier writers and authorities. The report of Jedediah Morse in 1822 enumerated 230 tribes, not including, of course, many now within the limits of the United States; the census of 1890 gives 280 tribes (Census Report 1890, volume relating to Indians, p. 35). This increase of numbers, when we consider the great number of extinct tribes (21 stocks or linguistic families having completely disappeared: Census Report, p. 35), argues the constant formation of new tribes; although the tendency in this direction must have been greatly checked by the pressure of white supremacy and the collection of Indians upon reservations, where in many instances tribal distinctions were ignored. These new tribes may originate from factions divided and separated from the parent stock, or from the gathering of Indians from different tribes under a great leader for a common purpose, as in the case of Sitting Bull in 1876, who would undoubtedly have formed a distinct and permanent tribe in Montana from the numbers who flocked to his standard had not the strong arm of the Government been exerted to break up his band and drive its chief into exile.

DISTINCTION BETWEEN TRIBE AND BAND.

If we pursue further the distinctions which we have assumed to exist between nation and tribe and tribe and band, we find that the band is an aggregation of Indians

in many cases differing in no respect from a tribe, as in the case of the Ogallala band or tribe of Sioux. In other cases it is smaller and less prominent, or less ancient in its origin than most tribes, although still differing in no respects from other tribes. We conceive that a band, within the intent of the statute, may be an Indian organization the members of which came originally from different tribes, as in Victoria's band; or it may form a part of a single tribe which has been separated from the rest of the tribe by mutual consent or by the act of a superior power, or which has, under the leadership of a chief, broken away from the parent tribe and refused longer to owe it allegiance, as Dull Knife's band in the case of Conners, No. 279, which is to be considered with this case. All these methods of forming tribes have been recognized, and it is probable that the beginning of Victoria's band and Dull Knife's band differ in no respect from that of all tribes which are not of patriarchal origin. An instance of the formation of a tribe after one of the methods named above is found in the case of Joseph's band of Nez Perce Indians, which refused to join with the main portion of the tribe in the treaty of 1863 with the United States and remained thereafter a separate band or tribe, recognized throughout as such by the United States and subsequently becoming hostile in the Nez Perce war of 1877, during which the original Nez Perce tribe was not only in amity with the United States but actually allied with the Government against their former friends. *Wolverton* v. *The United States et al.* (29 C. Cls. R., 107.)

In the case of *Herring* v. *The United States and Ute Indians* (32 C. Cls. R., 536) the court has said:

> A band, being the lowest and smallest subdivision, confederates more readily than any other form of corporate existence, so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief.
>
> *The different divisions of Indians have not usually originated from the conventional mode which organizes white persons into political communities, but have originated as a condition in fact, and when so existing they are recognized by the laws and treaties as a separate entity and held responsible as such.*

SIZE OF VICTORIA'S BAND.

It may be argued that Victoria's band and Dull Knife's band were not sufficiently important in point of numbers and fighting ability to carry on a war against the United States; and that, therefore, they should not be recognized as independent hostile bands; but if even a cursory examination be made of the history of various Indian tribes and bands which have been recognized as capable of carrying on war and of making peace with the United States from the beginning of our Government down to the present time, it will be seen that this objection is without weight.

It will be admitted that every independent tribe of Indians, whether recognized by treaty or not, comes within the provisions of the act of March 3, 1891.

Ten distinct treaties, ranging in point of time from 1795 to 1867, have been made with the Wea tribe, which is now located in the State of Kansas; and the Supreme Court has recognized the validity of these treaties and the incapacity of the State of Kansas to exercise jurisdiction over individuals of the tribe (*The Kansas Indians*, 5 Wall., 737, 741). There were confederated with them at different times the Peorias, the Kaskaskias, and the Piankeshaws, treaties having been made with all these tribes. Yet in 1872 the total population of all the tribes named, including the Weas, was only 160; and at the time of their confederation under the treaty of 1854 they numbered only 259. (Report Secretary Interior, 1872, p. 426.)

With the Wyandotte Indians the United States negotiated nineteen treaties, from 1785 to 1867. Seven of these, ranging in date from 1818 to 1855, were with the Wyandottes alone; in the others they were joined with other tribes. The Wyandottes numbered in 1872, 222 souls, and in 1862, 435 (ibid).

A treaty was made in 1853 with the Cow Creek band of Umpqua Indians in Oregon. The exact number of this band is not known, but it was very small.

The Quapaws, with whom treaties were made in 1818, 1824, 1833, and 1867, numbered in 1872 about 240 souls. (Report Secretary Interior, 1872, p. 425.)

With the Rogue River tribe of Indians the United States made a treaty in 1853 and again in 1854. This tribe was the judgment debtor and appellee in the case of *Volk* v. *The United States and Rogue River Indians*

(168 U. S., 703), in which this court affirmed the judgment of the Court of Claims, dismissing the petition on the ground that the Rogue River tribe was not in amity with the United States at the date of the depredation. This tribe consisted at the date of the treaty of 396 souls. (Report Secretary Interior, 1854, p. 502.)

The Otoes and Missourias, with whom numerous treaties were made from 1817 to 1854, numbered in 1872 only 464. (Report Secretary Interior, 1872, p. 417.)

The Bannock Indians and the Piute or Snake Indians who were associated with them numbered in 1872, 521 and 516, respectively (Report Secretary Interior, 1872, p. 439); and in the case of *Marks et al.* v. *United States et al.* (161 U. S., 297) this court has held that the tribes named were not in amity with the United States in 1878.

According to the census of 1890 "the Palaiknihan stock [linguistic family], Pitt River tribe, Round Valley Reservation, Cal., consists of a *number of small tribes of California Indians, numbering in all only 581.*"

Illustrations similar to those cited above might be multiplied indefinitely, but enough have been given to show that the policy of the Government from the beginning has been to ignore the relative size or numerical strength of the tribes or bands of Indians which appear to be, and in fact were, independent bands.

Even before the establishment of the present form of government in the United States it was the practice, as is well known, to make treaties with the Indian tribes regardless of their size. In *Cherokee Nation* v. *Georgia*

(5 Peters, 125) Chief Justice Marshall refers to the Catawbas, with whom, he says, we have many ancient treaties, but who consist of only 80 or 100 polls.

The findings of fact in Montoya's case show that at about the time of the depredation or a little later Victoria's band contained from 200 to 250 Indians from the Mescalero tribe alone. He had also, as the findings further show, an indefinite number from the Warm Springs Agency, and at one time had with him 400 Chiricahua Indians. The court says further:

> During all the period of hostilities, as aforesaid, Victoria had under him a minority of the Chiricahua tribe of Apache Indians. At his solicitation he was reenforced from time to time during said period by a minority of the Indians from the Mescalero and Southern Apache tribe; besides had under him a number of unknown Indians from Mexico, making in all about 200 Indians in his band at the time of the depredation hereinafter found. (Rec., 4.)

The statement in the appellant's brief that the number of Victoria's band varied from 13 to 250 is evidently based on the statement in the record that in June, 1879, Victoria, with 13 men, came into the Mescalero Reservation, which he left in July, taking with him not only the 13 men whom he had brought but all the southern Apaches on the reservation. This visit of Victoria to the Mescaleros bears every indication of having been for the purpose of stirring them up to hostility, and there is absolutely no foundation for the supposition that the 13 warriors who accompanied him composed his entire band, or were any more than a

bodyguard, to insure his safety from the reservation authorities.

In Conner's case the findings show that 320 Indians broke away from the reservation, to which they had been removed by authority of the Government, on September 9, 1878; the band under Dull Knife, at the time of the surrender, consisting of 148 souls, 49 of whom were men.

The war with Dull Knife's band is included in a list of about 40 important Indian wars of the century in the report of Indians taxed and untaxed of the Eleventh Census (p. 637).

These figures show that either of the bands whose status is under consideration was stronger numerically than many tribes and bands with which the Government has had treaty relations at various times extending over a long period of years; and stronger than some tribes, at least, which this court has decided to have been in relations of belligerency with the United States.

There can, therefore, be no argument against the recognition of these bands based upon their size.

THE SO-CALLED APACHE NATION.

That Victoria's band was similar in all essential respects to the other bands and tribes of Apache Indians is apparent to one who has carefully examined the history and relations of the Indians who were called by that name.

It can not be too strongly urged that a wholly false premise, leading to an utterly erroneous conclusion, would be relied upon if the court should accept any conception

of the Apache Indians as one tribe or nation, using the latter term in the political sense. The name is one indicating racial, rather than political, affinity; and the various tribes and bands of Apaches have always been independent in every respect of each other and often at war among themselves.

The Report of the Bureau of Ethnology for 1885–86, which is an exhaustive analysis of the racial relations of the American Indians, based on linguistic distinctions, uses the term "Apache" as descriptive of one branch of the southern group of tribes belonging to the Athapaskan family, the same group including also the Lipan Indians of Texas (now in the Indian Territory) and the Navajoes of New Mexico and Utah. The total number given as belonging to the southern group of the Athapaskan family is 23,409. Of this number the Navajoes alone numbered 17,208 and the Lipans 15, leaving *but 6,186 Apaches all told.* These were scattered over all New Mexico and Arizona, and one band (the Na-ish-a) in Texas. Aside from the Lipans and the Navajoes the principal tribes of this southern group were 14, as follows:

Arivaipa, Chiricahua, Coyotero, Faraone, Gileno, Jicarilla, Llanero, Mescalero, Mimbreno, Mogollon, Na-i-ha, Pinal, Coyotero, Tchikun, and Tchishi. (Report Bureau of Ethnology, 1885—86, p. 55.)

It is to be noted that these are only the *principal* tribes, and that the report does not pretend to name all tribes and bands; and that this report was made in 1885, some years after the defeat and annihilation of Victoria's band by the United States army.

In the early stages of the litigation concerning Indian depredation claims this subject was involved in some confusion owing to the fact that treaties had been made purporting to be with the Apache Indians as a whole. A treaty was made with the "Apache Nation" of Indians in July, 1852 (10 Stat. L., 979), with the "chiefs and headmen of the Comanche, Kiowa, and Apache tribes or nations of Indians" in July, 1853 (10 Stat. L., 1013); one with the "Apache, Cheyenne, and Arapahoe tribes of Indians" in October, 1865 (14 Stat. L., 713); and one in October, 1867, with the "Kiowa, Comanche, and Apache tribes of Indians" (15 Stat. L., 589). The three latter treaties, however, were negotiated in Kansas, from 500 to 800 miles from the scene of operations of Victoria's band and more than a thousand miles from the home in Arizona of the majority of the Apaches; the only Apache Indians concerned in them were a small band known as the "Na-ish-a" band, which numbered about 500 at the time when the treaties were made, and 326 in 1885 (Report Bureau of Ethnology, 1885–86, p. 56; report on Indian tribes taxed and untaxed, Eleventh Census, p. 538). This small band was wholly separate from all other Apache Indians, and was so distinct in a political capacity that it was incorporated first with the Kiowas and Comanches by the treaty of 1853, then transferred to the Cheyennes and Arapahoes by the treaty of 1865, and finally returned to its association with the Kiowas and Comanches by the treaty of 1867. These facts appear in the reports accompanying the drafts of the treaties.

The fact that this small Na-ish-a band is described in a

treaty as "the Apache Nation" shows the loose use of the term and the imperfect knowledge of the situation which led to it. The same defect is apparent in the treaty of July, 1852, which purports to be with the Apache Nation alone; it is signed by only six chiefs or headmen, who could by no possibility have represented more than the same number of bands of Apaches; and when the situation became better known the absurdity of the treaty was so apparent that it has not been recognized as binding the various Apache tribes, the Commissioner of Indian Affairs having stated repeatedly that different tribes of Apaches were not in treaty relations with the United States; and in the Revision of Treaties with Indian Tribes, made in connection with the revision of the statutes in 1873, this treaty was omitted altogether.

The loose and inaccurate use of such expressions in treaties, and imperfect knowledge of the tribal relations of the Indians of the Far West and Southwest in the early days, have led to the impression that the Apaches constituted one political organization similar to that of the Navajoes or to the various bodies of the Five Civilized Nations. A more erroneous view could not be conceived. There is not and never was any sort of political connection between the different tribes and bands of Apaches. They have frequently been at war with one another. There is not and never was any central organization or any great chief recognized by all, or even by any two or three bands or tribes of Apaches. The very name "Apache" is used by those who are familiar with the relations of the Indians thus designated merely as a descriptive term applied to a group of tribes having

many characteristics in common, but who are wholly independent of one another as regards government and everything that pertains to tribal autonomy.

The Court of Claims, which has heard and determined more than 2,000 of these Indian depredation cases, during the process of which litigation the question of the amity and the political relations of the various tribes throughout the United States has been examined from every point of view and in the light of a vast quantity of documentary evidence, said in the case of *Dobbs* v. *The United States and Apache Indians* (33 C. Cls. R., 308, 314):

> As the litigation of these Indian depredation cases has gone on, the fact has become more and more apparent that the Southwestern tribes during the last fifty years have had no defined or definable nationality or tribal entity, and that they were little more than robber bands dwelling in the fastnesses of the mountains or moving like Arabs on the arid plains. The Apaches, for illustration, supposed to be one people, were a unity only in race. In fact, they consisted of bands having different habitats, with no common purpose, no semblance of government, tribal or confederate, occasionally cooperating in war against a common enemy, as civilized nations do, but being in their several entities each as distinct as if the others did not exist. They had no "long house," like the Iroquois, in which the representatives of the Six Nations met to confer concerning the common welfare, and no several organizations. These bands, too, were each of them paltry in numbers, so paltry that if they had appeared as rioters in one of our great cities the local police would have overcome them and restored

> order without the aid of the military in a single day. Their strength was not in numbers or organization, but in their incomparable bravery, hardihood, and military genius—a genius which, until General Crook made friends with a portion of them and organized Apache scouts to follow and fight Apache Indians, had successfully resisted and eluded the military forces of the United States and Mexico. More than a hundred years ago the Apaches required the presence of 4,000 Spanish dragoons to protect the Mexican frontier.

The condition so clearly set forth in this opinion must be taken into consideration in interpreting the statute which refers to a "band" of Apache Indians.

DIFFICULTY OF DISCRIMINATING BETWEEN BAND AND TRIBE AND TRIBE AND NATION.

It must be apparent that the rough distinctions which were tentatively drawn between bands and tribes and between tribes and nations are by no means adhered to in the discussion and recognition of groups of Indians either by historians or by contemporaries. They have not been observed by the Government in its dealings with the Indians. Even in the making of treaties, where every solemnity is observed and where the greatest attention is paid to form, we find much confusion in this respect. Treaties have been made with bodies of Indians as "nations," and at a later date other treaties have been made with the same bodies of Indians as "tribes." Similarly, distinct tribes of Indians are sometimes called "bands" in treaties, the very act of making which show that the "bands," were

considered as wholly independent of other connection in a political sense, and that the Senate and the Executive used the word "band" to indicate a body possessed of the same qualified sovereignty and entitled to the same recognition in a political capacity as the "tribes" or "nations" with whom other treaties were made. Such treaties have been made with the "Eastern Band of the Bannocks and Shoshones," the "Blackfoot Band of Sioux," the "Bois-Forte Band of Chippewas," the "Calapooia" and "confederated bands of Willamette Valley," the "Pillager Band of Chippewas," various bands of Sioux Indians, and many others, the list being extended in the brief for the appellants (pp. 8–16).

The conditions which contribute to the confusion resultant upon the recognition of the various bodies of Indians as semiindependent states are well set forth by Bancroft in the passage quoted in the opinion of the court, which is printed as a part of the record in the Montoya case:

> But the great peculiarity of the Indians consisted in the want of political connection. A single band often constituted a government; a collection of 10 or 20 wigwams might be an independent state. The greatest chief in the country could not muster more than 700 or 800 fighting men. The dialect of each government seemed a language by itself.
>
> Their government rested on opinion and usage, and the motives to the usage were never embodied in language; they gained utterance only in the fact, and power only from opinion. No ancient legislator believed that human society could be maintained with so little artifice. Unconscious of political

> principles, they remained under the influence of instincts. Their form of government grew out of their contentions and their wants, and were therefore everywhere nearly the same. Without a code of laws, without a distinct recognition of success in the magistracy by inheritance or election, government was conducted harmoniously by the influence of native genius, virtue, and experience. * * * The Indian chief has no crown or scepter or guard. No outward symbols of supremacy or means of giving validity to his decrees. The bounds of his authority flowed with the current of opinion in the tribe; he is not so much obeyed as followed with the alacrity of free volition and therefore the extent of his power depends on his personal character. There have been chiefs whose commanding genius could so overawe and sway the common mind as to gain for a season an almost absolute rule, while others had little authority, and if they used menaces were abandoned.

In the last analysis the distinctions between band and tribe and tribe and nation vanish; and the common-sense view of the statute is, not to make the restriction clearly intended by its terms a matter of hair-splitting inquiry as to the political capacity of the hostile band of Indians, but to consider that by the inclusion of the term band Congress meant not to enter into the subtle refinements of international law, but to remove all possibility of doubt and to make clear provision, by the use of words which are easily understood and not susceptible of ambiguous interpretation, for recovery for depredations committed by individuals belonging to organizations which were at peace with the United States, and by the same

clear terms to enact that whenever any organized and armed Indian opposition to the United States authority and forces is in the field, persisting for a period of years under the same organization and the same leaders in the policy of war against the United States, the incidental depredations and foraging raids made by such organization or by its members are not depredations for which the United States is responsible to its citizens; in conformity to the universal rule governing responsibility for private property destroyed by the enemy in time of war.

THE ACT OF MARCH 3, 1891, DRAWN WITH REFFERENCE TO WARS WITH BANDS OF INDIANS.

That this was the purpose of Congress is made more certain by the fact that the act was apparently drawn with especial reference to the numerous wars which had been waged from time to time with bands of Indians similar to that of Victoria.

In the appellant's brief reference is made to the act of 1834, in which the same requirement of amity appears, but in which the only word used to describe the Indian body is the word "tribe." It is argued that the words "tribe, band, or nation" in the act of March 3, 1891, meant no more than the word "tribe" in the act of 1834. This, as an abstract proposition, may be granted; for it can not be doubted that if the court were charged with the duty of ascertaining whether a tribe to which depredators belonged was in amity with the United States, it would look to the actual independent political body, under whatever name, and its status with reference to amity would determine the jurisdiction of the court.

But, if there were any doubt upon this point, the deliberate action of Congress in 1891 would resolve that doubt in favor of the decision made by the Court of Claims. Between the date of the first and the last acts the policy of the Government with reference to Indian tribes had been radically changed. In 1871 Congress had prohibited the making of further treaties. It had become known to the executive branch of the Government and to Congress that the Indians of the Southwest did not possess a national government; that they were divided up into numerous small but independent bands, which severally had all the attributes of sovereignty ever possessed by any Indian tribe, but with whom it was no longer considered necessary to deal by treaty.

Again, Congress was informed that during the years intervening between 1834 and 1891, and more especially during the decade just preceding the latter date, there had been numerous Indian wars with bands of Indians which had never been treated with formally and whose recognition as independent powers had been practically forced upon the field of battle. The Blackhawk war from 1865 to 1867, the war with Dull Knife's band of Northern Cheyennes in 1878, with Sitting Bull's band of Sioux in 1876 and 1877—made memorable by the loss of the gallant Custer and his men—the war with Victoria's band in 1877–1880, and, still more recently, the noted campaign against the Apache chief Geronimo in 1885 and 1886, were all fresh in the recollection of everyone who had to deal with Indian affairs. It was in the light of knowledge of these facts that the act of March 3, 1891, was framed.

Turning now to the history of the act itself we find that as it was passed by the House it required only that the depredation which was the subject of complaint should have been committed by Indians and that the court should find, if possible, the tribe of Indians by whom the wrong was committed and that the judgments should be charged against the annuities or permanent funds belonging to such tribe. (House bill No. 8150, Fifty-first Congress, second session; House report No. 1079, Fifty-first Congress, first session.)

In the Senate a substitute for this bill was adopted in which the requirement of amity was inserted, making the statute conform with all previous legislation on this subject; and the jurisdictional clause of the statute was framed as it now exists. By this provision, afterward enacted into law, the jurisdiction of the court was limited to cases where the political body to which the depredators belonged was in amity with the United States; but instead of using the single term "tribe" which had been used before, the more comprehensive description "band, tribe, or nation" was inserted. (Senate report 1886, Fifty-first Congress, second session.)

The appellees accept the conclusion that the word "band" has a similar meaning to the words "tribe" and "nation;" but to be similar is not to be identical. The association of terms which implies similarity precludes the possibility of identity. The presumption against redundancy in the statute is as strong as the presumption of similarity of meaning from the association of terms. The use of the word "band" indicates a knowledge on the part of Congress of the possible or actual existence of

an independent political organization among Indians which was not fully described by the word "tribe," though in all essential respects resembling a tribe. The only reasonable explanation of the insertion of the additional words is that Congress, with the history and character of the recent Indian wars fresh in memory, used the comprehensive terms of description, out of abundance of caution, to exclude any possible doubt as to the bodies of Indians whose amity was to be determined.

INDEPENDENCE THE TEST.

What, then, is the criterion by which we may determine whether an organization of Indians is capable of sustaining relations of belligerency? If, as we have seen, numerical strength is not the determining factor; if we find that bodies of Indians are recognized as States, who have no government except the will of a single chief, and others who have a government nearly as complex as our own; if in some instances this Indian State is fixed in locality while in others it is nomadic, having not even a village that is permanent; if all these organizations alike fail of having all the attributes of sovereignty, even the fundamental right of dominion over the soil being, to all alike, denied them by the United States; if none of these tests, nor any others that go to distinguish a civilized nation from a horde of savages, can be applied in the case of an Indian State, what is the standard by which the court can distinguish a responsible band or tribe of Indians from a mere body of irresponsible robbers and outlaws?

In the opinion of counsel for the appellees the test to be applied is that of independence. By this is meant not absolute independence, which no Indian State has, or ever had after the advent of the Caucasian race, but independence of other Indian authority. However a tribe or band may have originated, whatever the purpose of its members in confederating, however large or small the band may be, the moment its separation from another tribe or tribes assumed a character of permanency, the moment that it ceased to owe or to acknowledge allegiance to any other authority, the moment the tribe or nation of which it had formerly been a part, or to which its members had formerly belonged, ceased to exercise or to claim control over it, and expressly or tacitly disavowed responsibility for its acts, in that moment it became a de facto band (or tribe, if you will, since it is by the same means that tribes arise), and became a living entity, responsible for its own acts, and, under the statute, for the unlawful acts of its individual members.

The attitude of the Government from the beginning has been to recognize, under whatever name, the de facto organization which showed itself capable of acting for itself either in making war or in making a treaty of peace. To quote from the opinion of the Court of Claims in this case:

> The main purpose in treating with the Indians was to secure and maintain peace with them and thereby open up the country to advancing civilization; and whenever that could be obtained, treaties appear to have been made with them without reference to their particular form of government or

tribal organization. The chief executive or responsible head of the organization, whatever its character, was the one whose signature was sought in making treaties.

The cases cited in the brief for the appellant (pp. 33–35) hold that the courts must recognize bands, tribes, or nations as such when treaties have been made with them, the action of the political department of the Government binding the courts. It does not follow, however, that where no treaty has been made the court may not determine the status of the band or tribe from other factors. Indeed, counsel for the appellant would be the last to contend that recognition by a treaty is necessary to establish the suable character of an Indian tribe under the act of March 3, 1891, inasmuch as many similar claims are against Indian tribes with whom no treaty has ever been negotiated. The distinction is recognized in the opinion in the *Graham Case* (30 C. Cls. R., 333), quoted with approval by the appellant (brief, p. 35).

It is not to be lost sight of in considering this case that it arose in 1880, some years after the passage of the act of March 3, 1871, which forbade the making of further treaties with Indian tribes, while it recognized the validity of those which had already been made (16 Stat. L., 544 and 566). This does not affect the question of amity. The leading case on that question (*Marks* v. *The United States et al.*, 161 U. S., 297) involved a depredation committed in 1878. But since the date of the statute, of course, no band or tribe of Indians has been

recognized by treaty, and other factors must determine their status. Dull Knife's band had, prior to that time, followed the fortunes of the other bands of the Northern Cheyenne tribe. Victoria's band, while it was known as a separate band as early as the year 1868 (Report Secretary Interior 1868, p. 635), did not attain prominence until a later date. Hence neither of these bands could have been treated with formally.

In dealing with this question the Court of Claims, in the case of *Dobbs* v. *The United States and the Apache Indians* (33 C. Cls. R., 308), said, Chief Justice Nott delivering the opinion:

> In dealing with the question of the amity of such a tribe as a band of Apaches the court has been more and more compelled to fall back upon the purpose of the earlier statutes, which created a liability and gave to these claimants their right of action. That purpose, as has been said before, was to keep the peace—to prevent Indian warfare upon the frontiers. * * * The practical question then is, Who were the Indians whose amity was to be maintained? Who were the Indians so affiliated with the depredators in fact that the depredators might reasonably be regarded as a part of them, and they be regarded as a body whose amity it was desirable to maintain?

In another case in the Court of Claims, in a decision which has been acquiesced in without question by both claimants and defendants, and in a case where the amity of a small band of Apache Indians, who were at that time living along the banks of the Mimbres Creek in

New Mexico, and hence known as Mimbres Apaches, Peelle, J., delivering the opinion of the court, said:

> The policy of the United States in dealing with the Indians has been, as we understand, to accept the subdivisions of the Indians into such tribes or bands as the Indians themselves adopted and to treat with them accordingly.
>
> So that if such subdivisions, whether into tribes or bands, have not been recognized by treaty, but have been by the officers of the Government, whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe or band upon which to predicate a judgment.
>
> Or if there be no such recognition by the Government, then the court will accept the subdivisions into such tribes or bands as made by the Indians themselves, whether such tribes and bands be named by reason of their geographical location or otherwise.
>
> If a number of Indians, with a chief or headman, make their home in the vicinity of the Mimbres Rivulet, in New Mexico, or on the Arivaipa Creek, in Arizona, as a tribe or band, as in the case at bar, that is sufficient to identify them in the absence of any other name, and particularly when they are a part of a common family whose general or family name is known. (*Tully* v. *United States et al.*, 32 C. Cls. R., p. 1.)

THE CHARACTER OF VICTORIA'S BAND.

In the brief of the appellant there seems to be a curious assumption that the court will accept a view which is not sustained by the record, if it be but asserted often enough in the brief. From the expression on the outside of the cover, "Victoria's and other like marauding

bands," to the "disorganized and robber band without national character," on pages 32 and 33, the brief is filled with characterizations of Victoria's band as "robbers and murderers," "a gang of thieves," "a band of cutthroats," "a depredating band of renegades," et cetera.

It is needless to say that these expressions are not sustained by the record. The Court of Claims says expressly in its opinion:

> It was not an assembly or organization of people having in view plunder and pillage for a day or a week and then of separating and returning to their several homes * * * but it was a band separate and distinct in its organization * * * and having confederated themselves together under the leadership of Victoria as a band for the common purpose of hostilities and war. (Record, p. 11.)

And again—

> The confederation of Indians from the various tribes or bands under the leadership of Victoria, as set forth in the findings, *was not for the purpose of robbery and theft, but was for the purpose of aiding Victoria and his Chiricahua followers in resisting the military authorities in removing them to the San Carlos Reservation.* (Record, p. 7.)

If the history of Victoria's band originated in the attempt of the United States forcibly to remove the Chiricahua Indians from the home where they and their ancestors had been born, and from the land which long years of occupancy and enjoyment had caused them to regard as their own; if, as the necessary consequence of their rebellion against this summary action by the authorities of a race of people whom they, with at least

some show of reason, regarded as their oppressors, a war began in which they persisted, although fighting against overwhelming odds, even to the point of their annihilation—shall such a struggle be contemptuously characterized as that of a "band of cutthroats?" Shall the purpose which actuated this heroic band, battling for their homes, be scornfully dismissed as that of mere "robbers and murderers?" It must not be forgotten that this combat has been described to us only by the pens of the conquering race. If the Apache Indians had a Homer, who can doubt that the prowess and achievements of Victoria would be celebrated in poetry and song throughout a thousand years? We can not justify Victoria's method of warfare; but it was the Indian method, and we can not say because it was barbarous it was not war. It has ever been the custom of the victor to belittle and despise the purpose and motives of the vanquished, and the insolence of the conqueror often goes very far in the contemptuous characterization of his fallen foes; but in after years, when time has softened the injury inflicted by that foe and when man's passions have cooled, history can afford to do justice to the loser, even though he has had no advocate of his own race and his story must be told by the unsympathetic pen of his former enemy.

The statement that the existence of Victoria's band dates from the effort in 1876 to put the Chiricahua Apaches on the San Carlos Reservation is not strictly accurate. That was undoubtedly the date when it first engaged, alone and unsupported by other Apaches, in war with the United States; but Victoria's band was in existence, and was recognized by the United States as a

band, as early as 1868. (Report Secretary Interior, 1868, p. 635.)

Another wholly incorrect conception of the nature of the band would be derived from the acceptance of the following statement in the brief for the appellant: "They never had the necessary cohesion which would make them the proper subject of negotiations as a new tribe. They separated and gathered together as their convenience dictated. If some of his warriors left Victoria they returned to their reservation and resumed relations with the Mescalero, or Chiricahua, or other tribe to which they belonged." (Brief, p. 32.)

There is nothing whatever in the record to sustain or justify this statement. However different from ours the Indian's idea of tactics may be, however frequently they may have scattered for the purpose of eluding their foe, to gather again at some other point, there is nothing to show that any Indian warrior who once joined his fortunes with those of Victoria's band ever turned back.

Another erroneous view is that Victoria's band was made up of outlaws from other bands or tribes. It is of course true that he received accessions from other bands of Apaches—from the Mescaleros and from the so-called Southern Apaches—but this did not give character to the band. This had been in existence for years before that time, and Victoria had been its chief. These accessions came to him when in the full tide of success, after he had maintained the war with his own band for several years.

Subject to such considerations as necessarily arise from the act of 1871, forbidding the making of treaties with

Indian tribes in the future, and the fact that Victoria's band first came into prominent notice at a time subsequent to that date, the appellees contend that Victoria's band satisfies even the definition of the word "band" as given by the appellant on page 18 of his brief, to wit: "An organization of like character to a nation or tribe, capable of making treaties and holding tribal funds, entitled to the recognition of belligerent rights, and so recognized by the political department of the Government."

Victoria's band was an organization of like character to a nation or tribe of Indians in that it was a body of Indians recognizing a common chief, united in a common purpose, dwelling together and acting as a unit under the control and direction of the chief. It was as capable of making treaties and holding tribal funds as many another band of Indians with whom the United States has made such treaties, and there is nothing in the history of the dealings of the United States with Indian tribes to indicate that, had the opportunity arisen for making peace with Victoria's band, and had the making of treaties not been prohibited by statute before that time, a treaty of peace would not have been made with the band and the Indians composing it assigned to some one of the reservations set apart for Indians, or a separate reservation established for their occupancy, and annuities settled upon them to prevent a recurrence of their outbreaks against the white inhabitants of the country. This course was pursued again and again with Indians who had been at war with the United States and might have been pursued, even without the formality

of a treaty, in the case of Victoria, had his grievance against the United States been less acute or had he shown any disposition to forget the injuries that he had received and to adjust his differences with the authorities of the United States on a peaceful basis. To pass to the third division of the definition, Victoria's band was entitled to the recognition of belligerent rights, and actually enjoyed such belligerent rights, as did the Indians belonging to other bands who made war against the United States in the same fashion and under similar circumstances. Finally, Victoria's band was recognized by the political department of the Government, not, to be sure, by the negotiation of a treaty (for reasons already recited), but by that branch of the Government having supervision of Indian affairs, and by the action of the executive in prosecuting against him a long and vigorous war, in which he was accorded the rights of a belligerent and treated with as such when opportunity arose.

A QUESTION OF FACT.

From the arguments that have been adduced it must be apparent to the court that the question in this case is largely a question of fact. Was Victoria's band, as a matter of fact, an independent political entity, similar to other Indian tribes, possessing the power to make war as Indian tribes possess that power, entitled to belligerent rights; and had it been so recognized? The answer to these questions, as given by the Court of Claims, which in the trial and adjudication of more than 2,000 similar cases against hundreds of different tribes and bands has

become thoroughly familiar with the subject, is found in the findings of fact.

> From the reports referred to [reports of the Commissioner of Indian Affairs and the Secretary of the Interior, civil officers of the administration] in the foregoing findings, and also in the various reports of military officers and the Secretary of War, embodied in the report of the latter officer in 1878 and 1880, it appears that the Indians under Victoria, from whatever tribes, were recognized or referred to under the name of Victoria's band, and under that name were operated against for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed, as aforesaid.
>
> * * * * *
>
> Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the depredation set forth in finding 3 was committed by Indians belonging to a war party or hostile band known as Victoria's band of Apache Indians, which *was at and long before that time known and recognized as a band separate and distinct in its organization and action* from the several tribes then at peace to which its members had formerly belonged.

SHOULD THE MESCALEROS BE HELD RESPONSIBLE?

The suits brought under the act of March 3, 1891, are suits against Indian tribes. The Indian tribe is the primary judgment debtor in every case in which judgment is rendered for the claimant, except where the Indians can not be identified. By the sixth section of the statute it is provided that payment of the judgment shall be made, first, from annuities due the tribe; second, from

any other funds due the tribe from the United States arising from the sale of their lands or otherwise, and third, from any appropriation for the benefit of said tribe other than appropriations for their current and necessary support, subsistence, and education. In any case where no funds are available and where payment of the judgment must therefore be made from the Treasury of the United States, it is provided that the payment shall remain a charge against the tribe, to be deducted from any annuity, fund, or appropriation which may hereafter become available.

It follows that in the case of a depredation committed by one of these hostile bands, if we deny that the band is capable of maintaining hostility to the United States in the sense intended by the statute, payment for the depredations of its members must be made by the tribe or tribes to which they had originally belonged.

Taking this view of the case, the appellant argues that judgment should be rendered against the Mescalero Apache tribe. If the Indians committing the depredation belonged to the Mescalero Apache tribe, counsel says the tribe was in amity and therefore the judgment should be charged against that tribe. There is no reason, it is said, why the band's hostility should overcome the tribe's amity; why the temporary membership of Victoria's band should override the permanent membership of the Mescalero tribe. The answer to this is plain, assuming that the court shall agree with the opinion of the Court of Claims that Victoria's band was an independent band. The Mescalero Apache who left his reservation without the knowledge or contrary to the

wishes of the tribe and joined his fortunes with another independent band, having no relations with the Mescaleros, and at war with the United States, acted in a manner which was inconsistent with the longer retention of his membership in the Mescalero tribe and became ipso facto a member of the hostile band. For all purposes, he was no longer a Mescalero, but was a member of the band of which Victoria was chief. If in the expeditions which were from time to time made by Victoria's Indians for the double purpose of supplying the band with necessary provisions and supplies and of making effective their style of warfare, the particular raid which was the subject of this suit in the Court of Claims happened to have been committed by a member of the band who had formerly belonged to the Mescalero tribe, that circumstance was simply fortuitous. The character of the depredation is to be taken wholly from the nature and status of the organization to which the individual depredator belonged at the moment of the commission of the act. It is as if a detachment of Boer soldiers operating in Natal were ordered to make a foraging raid, and in so doing an American or German officer who had cast in his lot with the people of the South African Republic should be concerned in the taking of property. Suppose, for the purpose of illustration, that an international agreement existed by which civilized nations accepted a liability for the acts of their citizens similar to that which is imposed upon Indian tribes by the United States. In that event the circumstances would be identical with those in the case at bar. Would it be seriously argued that the

United States or Germany, being in amity with the British Empire, would therefore be liable to respond in damages for the acts of these adventurers who had joined their fortunes with one of the belligerent powers? Of course the question answers itself.

The statement is made that the allegiance of the depredators to Victoria's band was temporary, while their allegiance to the Mescalero tribe was permanent. There is no warrant in the findings for this assertion, unless we deny the possibility of any transfer of allegiance. On the other hand, the opinion says that this "was not an assembly having in view * * * separating and returning to their several homes." (Rec., 11.)

Even if the transfer of allegiance were not complete; even if the membership of the band were temporary, it would still be true that the members of the band, while they continued in such relation and operated with the hostile band and under its protection, owed to it a temporary allegiance which determined for the time being their national character.

The general principal is that an alien, while domiciled in a country, owes to it a local and temporary allegiance, which continues during the period of his residence, in return for the protection which he receives.

Janis v. *The United States*, 32 C. Cls., 407.
Hugh Carlisle et al. v. *The United States*, 16 Wallace, 147–156.
Leghorn Seizures, 27 C. Cls. R., 214.

The Mescaleros were bound to restrain their own members, but they were not obliged to go to war with Victoria's band to reclaim former members of their

tribe who had joined that band. This would be altogether in excess of the obligations of neutrals.

The question of the independence and tribal character of Victoria's band does not depend upon the accession of these Mescaleros. It was not until some time in the spring of 1880 that any of the Mescalero Apaches were induced to join Victoria; and then it was only the long-continued successful opposition of the band to the United States troops which fired the hearts of the Mescalero braves and induced them to cast in their lot with the hostiles. Victoria's band was, as we have already seen, known as early as 1868, and was composed primarily of Chiricahua Apaches. As such it was, at least after the forced removal of the Chiricahuas from their old home to the San Carlos Reservation and Victoria's refusal to submit, a homogeneous, independent hostile band. It had received accessions in 1879 from certain unattached Indians which had previously belonged to the Southern Apaches but were at that time kept by the Government on the Mescalero Reservation. These, however, were not Mescaleros. It was but a comparatively short time after the Mescaleros joined the band in 1880 that it was finally defeated in Old Mexico and Victoria with most of his followers slain.

The question of the tribal relations of those Mescaleros who had joined Victoria's band is, therefore, not involved with the question of the actual constitution and independence of the band, which were established before any of the Mescaleros joined it.

To hold any other tribe responsible for the acts of the Indians associated with Victoria would be highly unjust.

The statute imposes at best an extraordinary liability upon Indian tribes. It does this without the consent of the tribes, by the exercise of the strong arm of the United States. The only justification for the rule is that the protection which it affords to the settler whose property is taken by roving bands of Indians may induce him to refrain from indiscriminate reprisals, and thus lessen the probability of the outbreak of Indian wars; and that by its effect upon the tribes it may induce them to restrain their young men and other lawless elements from the commission of depredations upon the whites, through fear of the tax upon their funds and annuities which would result from depredations. To this end, most of the treaties upon this subject provide that if the property be restored by the Indians in council, or the guilty individuals delivered up for punishment, no monetary indemnity may be required. If now, in a given class of cases, the circumstances are such that it is beyond the power of the tribe to affect the action of the individual, beyond their power to restore to the owner the property which is taken from him, and beyond their power to deliver up for punishment the wrongdoer, and if at the same time the body really responsible for the depredation is already at war with the United States, then the reason for the rule fails utterly; and when the reason for the rule ceases the rule ceases. In the case at bar it was no fault of the Mescaleros and through no negligence of theirs that the depredation was committed by those members of their tribe who had left them and joined Victoria's band. The United States had failed to protect itself and its citizens against the

incursions of Victoria's band. An armed force was in the field under his command; he was even allowed, with a small number of his followers, to visit the reservation and use the arts of persuasion for the purpose of recruiting his force under the very eyes of the authorities. The horses, sheep, and cattle taken from citizens were not carried to the camp of the Mescaleros. The Indians did not return, for, notwithstanding the assumption in the appellant's brief that the permanent allegiance of the Mescalero Indians was with their own tribe, and that their allegiance to Victoria's band was but temporary, there is nothing to show that they ever returned to their former allegiance. They were loyal to Victoria's cause and perished with him. It was beyond the power of the Mescaleros to restrain them from depredating, or to restore the property which they captured.

To hold the Mescalero tribe responsible would be to violate every principle of equity.

In the appellant's brief it is said that if the logically resulting converse of the decision of the Court of Claims in this case be considered it will result that if, out of a hostile tribe, a minor band remains at peace and commits depredations, the tribe must be answerable for these depredations. This, however, does not follow; in fact, could not logically be held. If a tribe be hostile and there be a band theretofore belonging to that tribe which possesses or acquires sufficient independence and autonomous character to be held to be a separate entity capable of sustaining political relations with the United States different from, and even opposed to, those of a majority of the tribe as already constituted, the decision which

held this would necessarily carry with it a judgment not against the original tribe but against the band in amity.

The appellant contends (Brief, p. 29) that—

> The temporary purpose and varying constituency of such a band, as in the present case, renders it impossible to make it a party defendant. Where is Victoria's band to-day? Its existence was unlawful from the beginning, and it thus never acquired property from which the claimant might recover or the United States seek to indemnify itself.

Pointing out, in passing, the fact that it was not the varying constituency of Victoria's band which enables appellant to ask, "Where is Victoria's band to-day?" but the fact that the band was annihilated in battle with United States troops, we may acknowledge that the question of the proper party against whom judgment should be rendered is not without difficulty. It is not a question, however, which is peculiar to this case. It may be asked with equal pertinency in regard to many tribes which have been made parties and against whom judgment has been rendered without question and with a tacit acceptance of the United States as a responsible judgment debtor. With equal pertinency appellant might ask, Where is the Chiricahua tribe to-day? The court has rendered judgment against the Aravapai tribe of Apaches, against the Chiricahua Apaches, the Gila Apaches, the Jicarilla Apaches, the Mimbres Apaches, and the Pinal Apaches; yet not one of these tribes has to-day any independent tribal existence whatever. Under the concentration policy which was adopted between 1870 and 1880 and the application of which to the Chiricahuas

was the direct result of the rebellion of Victoria's band, all these Apaches have been forced together upon the San Carlos Reservation. Separately they have no property. The appropriations made by the United States for their support are made "for support and civilization of the Apache and other Indians in Arizona and New Mexico who have been or may be collected on reservations in Arizona and New Mexico." (30 Stat. L., 77, 585, 937.) Under this same appropriation is included all the revenue of the Mescalero Apaches, against whom appellant would have the court render judgment in this case. Their tribal name has been kept alive merely from the fact that the reservation upon which they lived, in common with other Apache Indians, was originally named for that tribe. They too have no property, have no separate appropriation for their support and maintenance, and have no tribal existence which is recognized by the political department of the Government. Other tribes against whom judgment has been rendered have disappeared wholly from the face of the earth. This is but another indication of the similarity of the conditions affecting the different bands and tribes of the Apaches and other Indians and of the anomalous conditions introduced into the adjudication of these cases by the enforcement upon the tribe of liability for acts of individuals committed many years ago.

In any event, no argument against the independent status of Victoria's band can be drawn from the fact that the band was annihilated in battle. A friendly tribe may become extinct as well as a hostile band. To contend that judgment may not be rendered in any case

where the band or tribe to which the depredators belonged has ceased to exist does not help the claimant in this case and would take away the remedy in many cases where the court now renders judgments which are paid out of the Treasury of the United States.

PRESUMPTIONS IN FAVOR OF THE APPELLEES' CONTENTION.

This is a statute in derogation of the principles both of the common law and the law of nations. By virtue of the power which Congress has to legislate in regard to Indian tribes, it makes them responsible for acts committed by individuals without the sanction and without the knowledge of the tribe. Such a statute is always strictly construed, and where a doubt exists it should be resolved against the extension of the terms of the act.

Again, it is a statute in derogation of the sovereignty of the United States, and as such it should be strictly construed. In another case appealed from the Court of Claims under this statute, Brewer, J., delivering the opinion of the court, said:

> In case of an award by the Court of Claims the United States become in fact, if not in form, the primary and a solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate. (*Leighton* v. *The United States*, 161 U. S., 291.)

On still another ground the presumption is in favor of the appellees' contention. The court said in the case of *Marks et al.* v. *The United States et al.* (161 U. S., p. 297):

> Again, as often affirmed in the decisions of this court, the Indians are in a certain sense the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit.

In *TheChoctaw Nation* v. *The United States* (119 U. S., 1, 28) this court said:

> How much more should this just and beneficent principle be applied in the interpretation of a statute which is in derogation of the ordinary principles of law and in derogation of the rights of the Indian tribes, considered as semiindependent nations under the general principles of international law.

JOHN G. THOMPSON,
Assistant Attorney-General.
LINCOLN B. SMITH,
Assistant Attorney.

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Supreme Court of the United States.

No. 43.—October Term, 1900.

Eutemio Montoya, Appellant,
vs.
The United States.
} On appeal from the Court of Claims

[February 11, 1901.]

This was a petition by the surviving partner of the firm of E. Montoya & Sons against the United States and the Mescalero Apache Indians for the value of certain live stock taken in March, 1880, by certain of these Indians, known as Victoria's Band.

The Court of Claims made the finding of facts set forth in the margin.*

Upon these findings of fact the court decided as a conclusion of law that the petition be dismissed. (32 Ct. of Clms. 349.) Claimant appealed.

Mr Justice Brown delivered the opinion of the Court.

The first section of the act of March 3, 1891, (26 Stat. 851,) vests the Court of Claims with jurisdiction to inquire into and finally adjudicate "First. All claims for property of citizens of the United States taken or

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* *Finding of Fact.*

1. At the time of the depredation hereinafter found Estanislao Montoya, Desiderio Montoya, and Eutimio Montoya were partners, doing business in Socorro County, New Mexico, under the name and style of E. Montoya & Sons, and were at the time, and long prior thereto, citizens of the United States, residing at San Antonio, in said county and Territory.

Thereafter, and long prior to the passage of the act of March 3, 1891, (26 Stat. L. 851,) the said Estanislao and Desiderio Montoya died, leaving the claimant herein surviving.

2. On the 12th of March, 1880, the said firm of E. Montoya & Sons were the owners of the horses, mules and other live stock described in the petition, then being herded and cared for by their agents at a place called Nogal, about 8 miles west of San Antonio, which were stolen by Indians in the manner set forth in finding 3. Said stock was at the time and place reasonably worth more than three thousand dollars ($3,000.)

3. Prior to 1876 the Chiricahua Apache Indians were living on what was known as the Chiricahua reservation, in southeastern Arizona, and numbered from 300 to 500 warriors. They had been a terror to the community and surroundings, and had met with success in their engagements with the troops of the United States Army. (Report Commissioner Indian Affairs, 1876, p. 10.)

In 1876 an effort was made by the authorities having charge of Indian affairs to remove said Indians and locate them on the San Carlos reservation, where they

destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

To sustain a claim under this section, it is incumbent upon the claimant to prove that the Indians taking or destroying the property belonged to a band, tribe or nation in amity with the United States. The object of the act is evidently to compensate settlers for depredations committed by individual marauders belonging to a body which is then at peace with the government. If the depredation be committed by an organized company of men constituting a *band* in itself, acting independently of any other band or tribe, and carrying on hostilities against the United States, such acts may amount to a war for the consequences of which the government is not responsible under this act, or upon general principles of law. (*United States* v. *Pacific Railroad*, 120 U. S. 227, 234.)

The North American Indians do not and never have constituted "nations" as that word is used by writers upon international law, although in a great number of treaties they are designated as "nations" as well as

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could be more certainly restrained from hostile acts, but they resisted, and the result was that only 322 Indians, of whom 42 were men under Chief Taza, were removed thither. Of those remaining 140 went to the Warm Springs agency in New Mexico, and about 400, including Victoria, became hostile, and roamed about in Old and New Mexico, committing depredations and killing citizens. (Report Secretary Interior, 1875, p. 711, and *ib.*, 1876, p. 4.)

Later these Indians were aided in their acts of hostility by Apache Indians from the Warm Springs agency, (Report Secretary Interior, 1877, p. 416,) and from this time until December, 1878, they continued their hostile acts.

In February, 1879, Victoria, a Chiricahua, who had previously rebelled against being placed on the San Carlos reservation, came near the military post of Ojo Caliente with 22 followers and agreed to surrender on condition that Nama's band, then at Mescalero, be allowed to join him, but only a few of that band surrendered, and in April following Victoria, with his followers, escaped and went to the San Mateo Mountains. (Report Secretary Interior, 1879, p. 100.)

The military forces pursued him into Arizona, where he recruited his forces from the members of his tribe then being held as prisoners of war at the San Carlos reservation, and he subsequently escaped into Old Mexico. (Record of Engagements with Hostile Indians, by General Sheridan, p. 84.)

On the 30th June following, Victoria, with 13 men, came into the Mescalero reservation, where there were at the time a few Gila, Membres, and Mogollen Apaches, known as Southern Apaches, and at his request the families of those Indians (Chiricahuas) who had been kept on the San Carlos reservation were sent for.

Victoria was soon thereafter indicted in New Mexico for murder and horse stealing, and he became fearful of arrest and conviction therefor and suddenly left the reservation (in July), taking with him those he had brought and also all the Southern Apaches on that reservation. (Report Secretary Interior, 1890, p. 100.)

They went west and began marauding, destroying property, and killing citizens, and so continued during the latter part of winter and early spring of 1880 within 40

tribes. Indeed, in negotiating with the Indians the terms "nation," "tribe" and "band" are used almost interchangeably. The word "nation" as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word "nation" a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language or racial origin, and acting for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than

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miles of the Mescalero reservation, Victoria in the meantime using his influence to induce the Mescaleros to join his forces, and by April, 1880, some 200 to 250, of whom 50 or 60 were men, left their reservation and joined him. (Report Secretary of Interior, 1880, p. 251.) They continued their warfare until driven by the troops under Colonel Hatch, United States Army, across the Rio Grande River into the San Andres Mountains in April, 1880, where he had a severe fight with them, and several of his men were wounded and a number of Indians, including a son of Victoria, were killed. They finally retreated into Mexico.

Under the leadership of Victoria they again crossed and recrossed the line to and from the United States, but were driven out twice by the forces under Colonel Grierson, United States Army, and their forces diminished, until finally the few remaining were driven by General Buell some time after October 1, 1880, into Mexico, where Victoria and nearly all of his followers were killed. (Report Secretary of War, 1880, pp. 86 and 118.)

During all the period of hostilities as aforesaid Victoria had under him a *minority* of the Chiricahua tribe of Apache Indians. At his solicitation he was re-enforced from time to time during said period by a *minority* of the Indians from the Mescalero and Southern Apache tribes; besides had under him a number of unknown Indians from Mexico, making in all about 200 Indians in his band at the time of the depredation hereinafter found.

These Indians were allied together under the name of Victoria's band for the purpose of aiding Victoria and his followers in their hostile and warlike acts against the citizens and the military authorities of the United States.

The alliance thus formed, as well as the hostile acts committed by the band, were without the consent of the several tribes from which the members of the band came and to which they had previously belonged.

From the reports referred to in the foregoing findings, and also in the various reports of military officers and the Secretary of War, embodied in the report of the

a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word "nation" as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.

We are more concerned in this case with the meaning of the words "tribe" and "band." By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership and concert of action.

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latter officer for 1879 and 1880, it appears that the Indians under Victoria, from whatever tribes, were recognized or referred to under the name of Victoria's band, and under that name were operated against for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed as aforesaid.

On the 12th of March, 1880, the property set forth in finding 2 was stolen and driven away or destroyed by the Mescalero Apache Indians, who were at the time allied with Victoria's band for the purpose of hostility and war as aforesaid, and that said band so constituted was not at the time of said depredation in amity with the United States.

But the Mescalero tribe, then on their reservation near Fort Stanton, about 100 miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victoria's band, was in amity with the United States.

Said property was taken without any just cause or provocation on the part of the owners or their agents in charge, and has never been returned or paid for in whole or in part.

4. Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the depredation set forth in finding 3 was committed by Indians belonging to a war party or hostile band, known as Victoria's band, of Apache Indians, which was at and long before that time known and recognized as a band, separate and distinct in its organization and action from the several tribes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States at the date of said depredation.

5. The claim which is the subject of this suit was presented to the defendant Indians in council on or before June 8, 1880, by S. A. Russell, agent for the Mescalero Apache Indians, under the direction of the Commissioner of Indian Affairs.

Whether a collection of marauders shall be treated as a "band" whose depredations are not covered by the act may depend not so much upon the numbers of those engaged in the raid as upon the fact whether their depredations are part of a hostile demonstration against the government or settlers in general, or are for the purpose of individual plunder. If their hostile acts are directed against the government or against all settlers with whom they come in contact, it is evidence of an act of war. Somewhat the same distinction is applicable here which is noticed by Hawkins in his Pleas of the Crown, and other ancient writers upon criminal law, as distinguishing a riot from a treasonable act of war. Thus it is said in Wharton on Criminal Law, section 1796, summing up the early authorities, (though never accepted as a definition of treason in this country): "That constructive levying of war, by the old English common law, is where war is levied for the purpose of producing changes of a public and general nature by an armed force; as where the object is by force to obtain the repeal of a statute, to obtain the redress of any public grievance, real or pretended; to throw down all enclosures, pull down all bawdy houses, open all prisons, or attempt any general work of destruction; to expel all strangers, or to enhance the price of wages generally;" but if these acts were directed against a particular individual they would amount to nothing more than an assault or riot.

While, as between the United States and other civilized nations, an act of Congress is necessary to a formal declaration of war, no such act is necessary to constitute a state of war with an Indian tribe. In his concurring opinion in *Bas* v. *Tingy*, (4 Dallas, 37,) recognizing France as a public enemy, Mr. Justice Washington recognized war as of two kinds: "If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war all the members act under the general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers." Indian wars are of the latter class. We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a mili-

tary force for their subjugation, is sufficient to constitute a state of war. (*Marks* v. *United States*, 161 U. S. 297.)

In determining the liability of the United States for the acts of Indian marauders, the fifth and sixth sections of the Indian Depredation Act should be considered as well as the first. By the fifth section "the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified." Of course, if the tribe to whom the Indians belong cannot be ascertained, this will not prevent a judgment against the United States, but if their connection with a particular tribe can be established, judgment shall also go against the tribe. By section six "the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find the depredation was committed, and shall be deducted and paid" from annuities or other funds due the tribe from the United States, or from any appropriation for the benefit of the tribe.

It is not altogether easy to reconcile the language of these sections, which seem to contemplate that the government may be liable for depredations committed by a *tribe*, with that of section one under which the jurisdiction of the Court of Claims is limited to the acts of "Indians *belonging* to any band, tribe or nation, in amity with the United States;" but the main objects of sections five and six would seem to be to impose upon the tribes the duty of holding their members in check or under control, and for a failure so to do to fix upon the tribe the responsibility for the acts of individual members acting in defiance of the authority of their tribe or band, upon the same principle that, by sundry statutes in England and in several of the United States, the hundred or the municipality is made responsible in damages for the acts of rioters. Like the English statutes, too, many of the Indian treaties provide that if the property be restored or the guilty members be delivered up for punishment, no pecuniary indemnity shall be required. On the other hand, if the marauders are so numerous and well organized as to be able to defy the efforts of the tribe to detain them, in other words, to make them a separate and independent band, carrying on hostilities against the United States, it would be obviously unjust to hold the tribe responsible for their acts. It can hardly be supposed that Congress would impose a liability upon tribes in amity with the United States, for the acts of an independent band, strong enough to defy the authority of the tribe, although it would not be inequitable to hold the tribe liable for individual members whom it was able, but had failed, to control.

Gauged by these considerations it is clear that the Court of Claims was justified in its ultimate finding that Victoria's band was at and long before the occurrence complained of "known and recognized as a band, separate and distinct in its organization and action from the several tribes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States." Conceding that the accuracy of this ultimate finding may be reviewed by this court by a reference to the special facts found as a basis for such finding, (*United States* v. *Pugh*, 99 U. S. 265,) in our opinion those facts amply support the finding.

It appears that prior to 1876 the Chiricahua Apache Indians, who numbered from three to five hundred warriors of a particularly savage type, were living on a reservation of their own in Arizona; and that during that year the department determined to remove these Indians and locate them upon another reservation, where they could be more easily restrained from hostile acts. A part of them resisted, and about four hundred, under the leadership of Victoria, began roaming about Old and New Mexico, committing depredations and killing citizens. These hostile demonstrations continued until December, 1878, soon after which Victoria made an offer of surrender on a condition that was not performed, and in the following spring he again took the field, pursued by the military forces into Arizona, and subsequently escaped into Mexico. Soon thereafter he was indicted in New Mexico for murder and horse stealing, when he went west and began marauding, destroying property and killing citizens, and so continued during the latter part of the winter and early spring of 1880. The operations against them continued until they were driven by the troops across the Rio Grande River, where a severe engagement ensued and a number of Indians, including a son of Victoria, were killed. The band appears to have been of sufficient strength and consequence to have been made the object of a military expedition, which operated upon both sides of the Mexican line, and finally resulted in a battle in Mexico in the autumn of 1880, where Victoria and most of his followers were killed. The Indians constituting this band seem to have belonged to different tribes of Apaches, and were about two hundred in number at the time this depredation was committed. They were evidently carrying on hostile acts against the settlers and military authorities of the United States, and the court expressly finds that such acts were "without the consent of the several tribes from which the members of the band came and to which they had previously belonged;" that they were denominated in various reports of military officers to the Secretary of War as "Victoria's band," and under that name were pursued for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed. The property in

question was stolen and driven away, or destroyed, by certain Mescalero Apache Indians, who were at that time allied with Victoria's band for the purpose of hostility and war as aforesaid, and the band so constituted was not in amity with the United States, although the Mescalero tribe, which was then upon its reservation about one hundred miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victoria's band, was in amity with the United States.

As it appears that the Mescaleros who committed the depredation were a part of Victoria's band, operating with them, and that such band was carrying on a war against the government as an independent organization, we think they were the band—the unit, contemplated by the act, and not the Mescalero tribe then living in peace upon their reservation near Fort Stanton, although the particular maurauders in question had belonged to that tribe before they joined Victoria's band. If the Mescalero tribe were held responsible for their acts it would follow that every tribe, members of which allied themselves with Victoria and shared in his acts of hostility, would be pecuniarily liable for all damages inflicted by a band over whom they could have no control. Such consequences would be so inequitable we cannot suppose them to have been contemplated by Congress.

The judgment of the Court of Claims is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.